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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 556

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, PETITIONER,

vs.

EDWARD C. WOLFE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

PETITION FOR CERTIORARI FILED OCTOBER 23, 1945.

CERTIORARI GRANTED NOVEMBER 19, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

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vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, WITHIN AND FOR PENNINGTON COUNTY

EDWARD C. WOLFE, Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Defendant

SUMMONS—Filed November 22, 1934

The State of South Dakota to the Above Named Defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, a copy of which complaint is hereunto annexed and herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber at his office in the City of Rapid City in the County of Pennington in said State of South Dakota, within thirty days after the service of this Summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within thirty days after the service of this Summons upon you, the plaintiff in this action will apply to the Court for the relief demanded in the said complaint.

Dated June 15, 1934.

H. F. Fellows, Attorney for Plaintiff, Pennington County, South Dakota.

I hereby become surety for costs in the above entitled action.

Hazel W. Fellows.

[fol. 6] IN CIRCUIT COURT OF PENNINGTON COUNTY

[Title omitted]

COMPLAINT—Filed November 22, 1934

For cause of action, plaintiff alleges:

I

That the plaintiff, Edward C. Wolfe, is a resident, citizen and inhabitant of the State of Ohio.

II

That the Order of United Commercial Travelers of America, a corporation, defendant herein, is an insurance corporation duly organized under and by virtue of the laws of the State of Ohio, and is a resident, citizen and inhabitant of the State of Ohio, and duly licensed to do business within the State South Dakota.

III

That on or about the 19th day of August, 1920, in consideration of the payment by the insured of the premiums demanded, the defendant did indemnify and insure Ford Shane in the sum of Six Thousand Three Hundred Dollars ($6,300.00) for death through external, violent and accidental means, termed an accident, which shall be occasioned by the said accident alone and independent of all other causes. That such insurance was evidenced by written contracts signed and issued by the defendant corporation and by it designated as certificate No. 169655.

IV

That Elizabeth Shane, the mother of said Ford Shane, was at the time of the death of said Ford Shane, as hereinafter set forth, the duly designated beneficiary and the person entitled in case of death by accident under the provisions of said policy to receive the entire payment and benefits thereunder.

V

That on the 8th day of May, 1931, the said Ford Shane was killed by an accident through external, violent and accidental means, and that his death was occasioned by said accident alone and independent of all other causes.

VI

That prior to the commencement of this action, and on or about June 16, 1931, said Elizabeth Shane gave to defendant due notice of such death and loss, and demanded payment in accordance to said contract, but that defendant failed and refused to pay the sum due thereunder, or any amount whatsoever.

VII

That prior to the commencement of this action, said Elizabeth Shane duly sold, transferred and assigned in writ-
[fols. 7-15] ing to this plaintiff all of her right, title and interest in and to said policy, or certificate, and any and all rights thereunder and proceeds thereof, with authority to enforce collection thereon and thereof and to take and do all necessary steps and acts to that end; and that there is now due to plaintiff by reason thereof the sum of Six Thousand Three Hundred Dollars ($6,300.00) with statutory interest thereon from June 16, 1931.

Wherefore, Plaintiff demands judgment against the defendant for the sum of Six Thousand Three Hundred Dollars ($6,300.00) with interest thereon at 7% per annum from June 16, 1931, together with the costs and disbursements of this action.

H. F. Fellows, Attorney for Plaintiff.

Duly sworn to by H. F. Fellows. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 16] In Circuit Court of Pennington County

[Title omitted]

Service of Amended Answer—Filed October 19, 1940

Service of Amended Answer of Defendant verified under date of May 15, 1940, by copy is hereby admitted to have been made on the 20th day of May, 1940. Also, it is stipulated on the part of the plaintiff that the defendant may file such Amended Answer in this action.

H. F. Fellows, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 17] IN CIRCUIT COURT OF PENNINGTON COUNTY

[Title omitted]

AMENDED ANSWER—Filed October 19, 1940

Defendant answers the Complaint of the plaintiff as follows:

I

Defendant denies each and every allegation in said complaint contained not hereinafter specifically admitted.

II

Defendant admits and states the fact to be that, at all the times mentioned in the complaint in this action, defendant has been and now is a fraternal benefit order or society organized under the laws of the State of Ohio, and during all of such times has been authorized to do business in the state of South Dakota as a foreign fraternal benefit society, and that it was authorized to indemnify and insure persons accepted by it against death effected through external, violent and accidental means, termed an accident, which shall be occasioned by the accident alone and independent of all other causes, in accordance with the terms of its constitution, by-laws, and articles of incorporation, then in force, or thereafter adopted by it.

III

Defendant admits that on or about August, 1920, it accepted Ford Shane for indemnity and insurance against death, and thereby did insure the said Ford Shane in the [fol. 18] sum of Six Thousand Three Hundred Dollars for death effected through external, violent and accidental means, termed an accident, and occasioned by the accident alone, and independent of all other causes, in accordance with the provisions of the Constitution, By-laws and Articles of Incorporation of the defendant order, then existing, or thereafter duly adopted. Defendant admits and alleges that the defendant issued to the said Ford Shane an "Insurance Certificate, which certificate, together with the constitution, by-laws and articles of incorporation then existing, or thereafter adopted by the defendant, constituted the contract of insurance between the defendant and the said Ford Shane.

IV

Defendant admits that the said Elizabeth Shane was thereafter and before the death of the said Ford Shane named and designated as the beneficiary of said insurance, and that she is the mother of the said Ford Shane.

V

Defendant alleges that the said contract of insurance between the said defendant and the said Ford Shane provided that the death benefit under said policy should be paid as follows and not otherwise, to-wit: Five Thousand Dollars within ninety days from the receipt by the Supreme Executive Committee of satisfactory final proofs of death of the insured and Thirteen Hundred Dollars in weekly installments of $25.00 each beginning within ninety days from the receipt of such final proofs of death, and said provisions of the contract are not in any way modified or nullified by any other provisions of said contract.

VI

Defendant admits that the said Elizabeth Shane furnished to the Supreme Executive Committee of the defendant proofs of the death of the said Ford Shane on or about June 1st, 1931, and not before that date.

VII

Defendant further alleges that the said contract of insur-
[fols. 19-20] ance between the defendant and the said Ford Shane expressly provided that the defendant order shall not be liable for death resulting from medical, mechanical, or surgical treatment, nor for death resulting from the intentional taking of medicine or drugs. Defendant admits that the said Ford Shane died on or about May 8, 1931, and alleges that the death of the said Ford Shane resulted from medical, mechanical and surgical treatment which was being administered to him at the request of the said Ford Shane, and resulted from the intentional taking of medicine and drugs on the part of the said Ford Shane.

IX

Defendant further alleges that said contract of insurance between the defendant and said Ford Shane contained the

further provision, which was not in any way modified by any of the other provisions of said contract, to-wit: "Nor shall benefits under this Article (meaning the article of the constitution of the defendant corporation which provided for making contracts of insurance), be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability, or loss." Defendant alleges and states that external, violent and accidental means, producing bodily injury, was not the proximate, sole and only cause of the death of the said Ford Shane.

[fol. 21] XI.

Defendant further alleges as a complete defense to this action, that it at all times has been a Fraternal Benefit Society created, organized and existing under the laws of the State of Ohio, and that at all times since the year 1919 it has been duly and regularly admitted to transact business in the State of South Dakota as a foreign fraternal benefit society. That on or about July 31, 1920, the said Ford Shane made application in writing for membership and insurance in the defendant Order, such application having been submitted to Council No. 516 of Rapid City, South Dakota, which was a local council of the defendant Order. Said application was duly accepted by the defendant Order, and on August 19, 1920, defendant issued to the said Ford Shane an insurance certificate numbered 169655, dated on said date, which was in words and figures as follows:

Class A

Insurance Certificate

The Order of United Commercial Travelers of America

Columbus, Ohio

An Association incorporated under the laws of the state of Ohio, hereby certifies that Ford Shane, a member of The Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an Insured Member of said Order under "Class A," beginning at twelve (12) o'clock, noon, Standard time, on the day this certificate is dated, and is entitled to all the

rights and benefits which may be provided for such "Class A" Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date.

This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payments of benefits, and any [fol. 22] changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.

In Witness Whereof, we have affixed our signatures and the seal of the Supreme Council, at Columbus, Ohio, this 19th day of August A. D. 1920.

W. B. Emerson, Supreme Counselor; Walter D. Murphy, Supreme Secretary. (Seal.)

That the said application of the said Ford Shane contained the statement over his signature in the following language:

> "I hereby agree to accept the Certificate of Membership and Insurance issued upon this application, subject to all the provisions, conditions and limitations of the Constitution, laws, rules and regulations of said Order as they now exist, or as they may hereafter be added to, revised or amended."

That on October 23, 1922, the said Ford Shane had been suspended from membership in the defendant Order, and on said date he made application in writing for reinstatement to membership. Such application contained the statement, as follows:

> "I also agree to accept the Certificate of Insurance issued upon this application, subject to all the provisions, conditions and limitations of the Constitution, laws, rules and regulations of said Order, as they now exist, or as they may hereafter be added to, revised or amended."

Thereafter, to-wit: On December 21st, 1922, defendant Order issued to the said Ford Shane a new insurance certifi-

cate, dated on said date, and numbered 169655, which aside from the date was in all respects in the same form and of the same content as the certificate of August 19, 1920, but had the words added thereto, to-wit:

> "This certificate supersedes all insurance certificates issued of a prior date bearing this number."

Defendant admits and alleges that the said Ford Shane kept said certificate in force until his death on or about May 8, 1931.

That the Constitution of the defendant Order, at the time [fol. 23] said Ford Shane first made his application for membership and insurance in the Order, and ever since, contained the following provision, which was not in any way modified or superseded by any other provision therein, or otherwise, being Section 11 of Article IV of the Constitution, to-wit:

> "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for such benefits is disallowed by the Supreme Executive Committee.
>
> "No Grand or Subordinate Council, officer, member or agent of any Subordinate, Grand, or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance as the same are now in force or may be hereafter enacted."

A copy of said provision of the Constitution was indorsed upon said certificate No. 169655 issued to said Ford Shane.

That the benefits claimed under the said certificates issued to the said Ford Shane were disallowed by the Supreme Executive Committee of the defendant on June 8, 1931, and notice of such disallowance promptly sent the beneficiary of the insurance of the said Ford Shane; that this action was not commenced prior to June 15, 1934, and plaintiff's right of action is barred because he did not commence his action within the said time provided by the Constitution of the defendant Order.

Defendant further alleges that Section 11 of Article IV of the Constitution of the defendant Order, referred to above, is valid and binding upon the members of the defendant

Order by and under the laws of the state of Ohio; that the highest court of that state has held and decided that a fraternal benefit society, by its constitution or by-laws, may limit the time within which suit must be brought to recover for benefits promised members. That it is the settled law of the State of Ohio that a fraternal benefit society may, by its constitution and by-laws, limit the time within which a suit may be brought for benefits growing out of membership, [fols. 24-25] and that a limitation of six months is a reasonable time. That plaintiff in his application for membership and insurance specifically agreed to the said provision in the Constitution which limits the time for bringing suit to six months as aforesaid, and Elizabeth Shane, the beneficiary under said certificate, plaintiff's assignor, complied with said provision by commencing an action to recover on said certificate for the benefits sought in this action, in the Circuit Court of Pennington County, South Dakota, on June 17, 1931, which action, after same was removed to federal court, the said Elizabeth Shane voluntarily dismissed and discontinued, all as more fully set forth in another paragraph of this answer. That the plaintiff is thereby estopped to assert that the period for commencing action as prescribed by the Constitution is not a reasonable time. That the laws of the State of Ohio are binding upon and govern the rights of all claiming benefits under the said certificate of insurance issued the said Ford Shane, and are binding upon and govern the rights of the plaintiff herein. That this is true without regard to where the said certificate was issued, or to where the said insured was domiciled at any time, and in any forum in which the beneficiary, or her assignor, may go to enforce claimed rights under said certificate.

That this is true because Section 1 of Article IV of the Constitution of the United States provides that "Full faith and credit shall be given in each State to the Public Acts, Records and judicial proceedings of every other state." That defendant relies upon said provision of the United States Constitution in this action, and claims the right to be protected thereunder. That to deny that said provision of the constitution of the defendant Order, which limits the time to bring suits on certificates of insurance to six months as aforesaid, is binding upon plaintiff and valid, would be a violation of said Section 1 of Article IV of the federal constitution, and a violation of defendant's rights thereunder.

[fol. 26] Wherefore, defendant asks the judgment of the Court that plaintiff recover nothing in this action, and that defendant have judgment against plaintiff for its costs and disbursements herein.

Sutherland & Payne, Attorneys for Defendant;
Byron S. Payne, a Member of Said Firm.

[fol. 27] [File endorsement omitted.]

[fol. 28] In Circuit Court of Pennington County

[Title omitted]

Requested Findings of Fact and Conclusions of Law and Order Thereon—Filed January 10, 1944

The Defendant requests the Court to make the following Findings of Fact:

I

The Defendant is a fraternal benefit order or society organized under the laws of the State of Ohio, and during all the period from the beginning of the year 1920 until on and after the year 1931, was authorized to do business in the State of South Dakota as a foreign fraternal benefit society, and was authorized to indemnify and insure persons accepted by it against death, effected through external, violent and accidental means, termed an accident, which shall be occasioned by the accident alone and independent of all other causes, in accordance with the terms of its constitution, by-laws and articles of incorporation, then in force, or thereafter adopted by it.

II

On or about August 19, 1920, the defendant corporation accepted Ford Shane for indemnity and insurance against death, and thereby did insure the said Ford Shane in the sum of Six Thousand, Three Hundred ($6,300) Dollars for death effected through external, violent and accidental means, termed an accident, and occasioned by the accident alone and independent of all other causes, in accordance with the provisions of the constitution, by-laws, and ar-

[fol. 29] ticles of incorporation of the defendant Order,

then existing or thereafter duly adopted. On or about said date, Defendant issued to the said Ford Shane an "insurance certificate", which certificate together with the constitution, by-laws and articles of incorporation, then existing or thereafter adopted by the Defendant, constituted the contract of insurance between the Defendant and the said Ford Shane.

III

On October 23, 1922, the said Ford Shane had been suspended from membership in the defendant Order and by reason thereof his insurance certificate issued by the defendant Order had lapsed. On the date above named the said Ford Shane made application in writing for reinstatement to membership in the defendant Order, and to have his insurance certificate reinstated in force. The application of the said Ford Shane for reinstatement was accepted by the defendant Order, and on December 21, 1922, the defendant Order reissued to the said Ford Shane the said insurance certificate bearing the same number as the original certificate. And the said insurance certificate originally issued on August 19, 1920, and as reissued on December 21, 1922, together with the constitution, by-laws, and articles of incorporation of the defendant Order, together with the application for insurance signed by the said Ford Shane, constituted the contract between the defendant Order and said Ford Shane, and govern the payment of benefits; and any changes, additions or amendments to said constitution, by-laws or articles of incorporation thereafter duly made bound said defendant Order and said insured member and his beneficiary and governed and controlled the contract in all respects.

IV

The said Ford Shane in his application for reinstatement of October 23, 1922, designated his mother, Elizabeth Shane, as the beneficiary of the insurance provided for by [fols. 30-31] said insurance certificate.

V

The said Ford Shane died on May 8, 1931, and said insurance certificate issued to him by the defendant Order was kept in force and was in effect up to and at the time of the death of the said Ford Shane.

VI

The said Elizabeth Shane promptly gave notice to the defendant Order of the death of the said Ford Shane and submitted proofs of death to the defendant Order on or about June 1, 1931. On June 8, 1931, the Supreme Executive Committee of the defendant Order disallowed and rejected the claim of the said beneficiary, Elizabeth Shane, for insurance under said insurance certificate, and notice of such disallowance was promptly sent to the said Elizabeth Shane.

VII

This action was begun by the service of summons on the defendant corporation on June 16, 1934, and the summons in the action was issued and bears date June 15, 1934.

[fol. 32]

X

The insurance contract between the defendant Order and the said Ford Shane indemnified against death and injury to the said Ford Shane only when such death or injury was occasioned by external, violent and accidental means as the sole cause of such death or injury; and the death of the said Ford Shane was not caused by external, violent and accidental means, as the sole cause of such death.

XI

The said insurance contract between the said Ford Shane and the defendant Order provided that the defendant Order should not be liable for death resulting from medical, mechanical or surgical treatment, nor for death resulting from the intentional taking of medicine or drugs. The death of the said Ford Shane did result from medicinal and surgical treatment and from the intentional taking of medicine and drugs.

XII

The insurance contract between the said Ford Shane and the defendant Order further provided that no suit or proceeding, either at law or in equity, shall be brought to recover any benefits under the insurance certificate after six months from the date the claim for such benefits is disallowed by the Supreme Executive Committee, and this action was not brought within six months from the date the claim for such benefits was disallowed by the Supreme

Executive Committee. The beneficiary on said insurance contract brought an action to recover benefits under said contract about five weeks after the said Supreme Executive Committee of the defendant Order disallowed her claim for benefits, and said limitation of six months within which to bring action for benefits under said insurance cer- [fol. 33] tificate was a reasonable provision under the circumstances affecting such claim for benefits, and is binding upon the beneficiary and those in privity with her, and this plaintiff.

XIII

The insurance contract between the said Ford Shane and the defendant Order provided as follows:

> "No Grand or Subordinate Council, officer, member or agent of any Subordinate, Grand, or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance as the same are now in force or may be hereafter enacted."

No provisions of the said insurance contract have been legally waived by any representative of the defendant corporation.

CONCLUSIONS OF LAW

Plaintiff asks the Court to conclude as the law applicable to the facts of this case as follows:

I

Plaintiff has brought this action too late because he did not bring same within six months after the claim for benefits under the insurance certificate was disallowed by the Supreme Executive Committee of the defendant Order, and this action is barred by the contract limitation of six months for the bringing of an action in said insurance contract.

II

Plaintiff is estopped by the decision and judgment of the United States Circuit Court of Appeals above described from claiming that the death of Ford Shane was caused by external, violent and accidental means; and is estopped from claiming in this action that the death of Ford Shane was not due to medical and surgical treatment, and from

the intentional taking of medicine and drugs, and the plaintiff, as the assignee of Elizabeth Shane, is bound by the determination and decision of the said Circuit Court of Appeals upon said points and questions of fact and law.

[fol. 34] III

The death of Ford Shane was not caused by, and the result of, external, violent and accidental means as the sole and only cause of death.

IV

The death of Ford Shane was caused by medical and surgical treatment and by the intentional taking of drugs and medicine.

V

Plaintiff is not entitled to recover in this action, and it should be so adjudged, and the defendant should recover its costs.

Respectfully submitted: Byron S. Payne, Attorney for Defendant.

Refused. Turner M. Rudesill, Judge.

[File endorsement omitted.]

[fol. 35] In Circuit Court of Pennington County

[Title omitted]

Request by Defendant for Additional Findings of Fact and Order Thereon—Filed January 10, 1944

Comes now the Defendant and requests the Court to make the following Findings of Fact, additional to those already requested to be numbered and known as Defendant's Requested Findings of Fact, Number III-a and III-b, respectively, and such findings to be in the following form:

Defendant's Requested Finding Number III-a

The insurance granted the said Ford Shane, as set forth, in the Defendant's Requested Findings numbered I, II, and III, was granted to the said Ford Shane upon a written

application, which was signed by the said Ford Shane in the State of South Dakota, and forwarded by mail to the defendant corporation at its home office in Columbus, Ohio. Likewise, the application for reinstatement made by the said Ford Shane for the reinstatement of his insurance was signed by the said Ford Shane in the State of South Dakota, and was forwarded to the home office of the defendant corporation at Columbus, Ohio. Said original application of the said Ford Shane for insurance contained the statement over his signature in the following language:

> "I hereby agree to accept the Certificate of Membership and Insurance issued upon this application, subject to all the provisions, conditions and limitations of the Constitution, laws, rules and regulations of said Order as they now exist, or as they may hereafter be added to, revised or amended."

Said application of Ford Shane for reinstatement contained the statement over his signature as follows:

> "I also agree to accept the Certificate of Insurance issued upon this application, subject to all the provisions, conditions and limitations of the Constitution, laws, rules and regulations of said Order, as they now exist, or as they may hereafter be added to, revised or amended."

[fol. 36] Defendant's Requested Finding Number III-b

The certificate of insurance issued to Ford Shane on August 19, 1920 was in the following form:

Class A

Insurance Certificate

The Order of United Commercial Travelers of America

Columbus, Ohio

An association incorporated under the laws of the state of Ohio, hereby certifies that Ford Shane, a member of The Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an Insured Member of said Order under "Class

A," beginning at twelve (12) o'clock, noon, Standard Time, on the day this certificate is dated, and is entitled to all the rights and benefits which may be provided for such "Class A" Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date.

This certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payments of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.

In Witness Whereof, we have affixed our signatures and the seal of the Supreme Council, at Columbus, Ohio, this 19th day of August A. D. 1920.

W. B. Emerson, Supreme Counselor; Walter D. Murphy, Supreme Secretary. (Seal.)

The reinstatement certificate of insurance issued by the defendant corporation to Ford Shane on December 21, 1922 was in the same form as the original certificate, except that it was dated December 21, 1922. The application of the [fol. 37] said Ford Shane for insurance, and the later application for reinstatement for such insurance, were both accepted by the Defendant corporation at Columbus, Ohio, and the certificates of insurance were issued by the defendant corporation at said place, and the insurance for the said Ford Shane became effective and went into force upon the acceptance of the application of Ford Shane therefor and the issuance of the certificate therefor, and the issuance of such certificate was the last act necessary to be done to make such insurance effective. That the contract between said Ford Shane and the defendant corporation was an Ohio contract, and is governed by the laws of Ohio.

Respectfully requested, Byron S. Payne, Attorney for Defendant.

The making of the within and foregoing requested Findings of Fact numbered and designated as Defendant's Requested Finding of Fact numbered III-a, and Defendant's

Requested Finding of Fact numbered III-b, is hereby refused and denied by the Court, to which ruling the defendant at the time excepted and the exception is allowed.

Dated this 6th day of January, 1944.

By The Court, Turner M. Rudesill, Judge.

[File endorsement omitted.]

[fol. 38] In Circuit Court of Pennington County

[Title omitted]

Order Denying and Refusing Defendant's Requested Findings of Fact and Conclusions of Law and Allowing an Exception Thereto—Filed January 10, 1944

The Defendant, The Order of United Commercial Travelers of America, a corporation, duly submitted to the Court, prior to the decision of the case, requested Findings of Fact and Conclusions of Law, and the Court having duly considered same, and being of the opinion that such requested Findings and Conclusions should be denied and refused, it is now Ordered that the said requested Findings and Conclusions of the Defendant be filed as part of the record in this case, and that such Requested Findings of Fact and Conclusions of Law, be, and the same, are hereby in all things denied and refused.

To this ruling of the Court, the Defendant at the time duly excepted, and the exception is allowed.

Dated this 6th day of January, 1944.

By the Court: Turner M. Rudesill, Judge.

Attest: W. B. Andrus, Clerk. (Seal.)

[File endorsement omitted.]

[fol. 39] In Circuit Court of Pennington County

[Title omitted]

Stipulation as to Submission—Filed April 4, 1944

It is hereby stipulated by and between the plaintiff through his attorney, H. F. Fellows, and the defendant through its attorney, Byron S. Payne, that the above en-

titled action may be submitted for determination and decision to the Honorable Turner M. Rudesill as Judge of the Circuit Court of the Seventh Judicial Circuit upon the record of the action as it was made up for submission to the late Honorable A. R. Denu, then Judge of said Court, on or about the 5th day of February, 1942, and the Reporter's transcript of the proceedings for the submission of the action to the Court at such time, and that no further or other trial of said case before the Honorable Turner M. Rudesill shall be necessary or had, but that the Court may proceed to make its decision in the action upon the said record and transcript.

Dated November 29th, 1943.

H. F. Fellows, Attorney for Plaintiff; Byron S. Payne, Attorney for Defendant.

[File endorsement omitted.]

[fol. 40] IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, WITHIN AND FOR PENNINGTON COUNTY

EDWARD C. WOLFE, Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Defendant

Decision—Filed April 4, 1944

The issue herein having been duly submitted to the Court, Hon. A. R. Denu, Judge, without a jury on the 5th day of February, 1942, plaintiff appearing by his attorney, H. F. Fellows and the defendant appearing by its attorney Byron S. Payne; and the said A. R. Denu having died prior to the rendition of a decision herein, and it being then duly stipulated between the said attorneys for the parties that the issues herein might be submitted for determination and decision to Hon. Turner M. Rudesill, the present Judge of the Circuit Court of the Seventh Judicial Circuit, upon the record of the action as it was made up for submission to the said A. R. Denu, Judge; and the said Turner M. Rudesill, Judge, having examined the said record and the briefs

submitted by the respective parties, and being fully advised in the premises, does hereby make his findings of fact and conclusions of law, which constitute the decision herein:

Findings of Fact

I

That the defendant, The Order of United Commercial Travelers of America is and was at all of the times hereinafter mentioned an insurance corporation organized and existing according to law and licensed to do business within the State of South Dakota.

II

That on or about August 19, 1920, in consideration of the payment by the insured of the premium demanded, defendant executed, issued and delivered to Ford Shane, as insured, its certain certificate or policy of insurance No. 169,655 wherein the defendant did indemnify and insure said Ford Shane in the sum of $6,300.00 for death through external, violent and accidental means, termed an accident, which shall be occasioned by the said accident alone and independent of all other causes.

III

That in said certificate or policy of insurance, Elizabeth Shane was the duly designated beneficiary and the person entitled in case of death by accident under the provisions of said policy to receive payment thereunder.

IV

That by exhibit 5, said Elizabeth Shane did duly sell, [fol. 41] transfer and assign in writing to this plaintiff all of her right, title and interest in and to said policy or certificate, and any and all rights thereunder and proceeds thereof, with authority to enforce collection thereon and thereof and to do all necessary steps and acts to that end.

V

That on the 8th day of May, 1931, the said Ford Shane was killed by an accident through external, violent and accidental means, termed an accident, and that his death was occasioned by said accident alone and independent of all other cases in the manner herein set forth.

VI

That at the time of the death of the said Ford Shane the said policy or certificate of insurance was in full force and effect, and he was a member in good standing in said Order and with his dues paid therein.

VII

That prior to the commencement of this action, defendant was given due notice of such death and loss and was furnished due and complete proof of death and of claim upon the blanks sent by the defendant insurer to said Elizabeth Shane, and which completed proof of death and of claim was received by the said insurer at the Home Office of the defendant corporation at Columbus, Ohio, either on June 2nd or on June 6th, 1931; and that said Elizabeth Shane and this plaintiff, prior to the commencement of this action, duly performed all conditions required by them to be performed under the said policy, and defendant has completely neglected, failed and refused to pay this defendant the amount due under this certificate or policy of insurance.

VIII

That on May 8, 1931, the said deceased, Ford Shane, went to the offices of Drs. Doyle & Janis at Rapid City, South Dakota, where a clinic was being conducted for the purpose of securing a physical examination of the posterior urethra; that Dr. A. J. Janis, the person who was to make said examination did, in order only that such examination might be conducted with as little discomfort to the patient as possible and in keeping with approved surgical and medical practice administered butyn, a drug having the same character and qualities as novocaine, as a local anaesthetic.

IX

That the said A. J. Janis was at such time a duly and regularly licensed physician in the State of South Dakota, and a physician and surgeon duly graduated in medicine and surgery from the University of Michigan, and a regularly practicing physician and surgeon in Rapid City, South Dakota, and skilled in his profession.

X

That immediately upon the administration of the said anaesthetic the said Ford Shane went into convulsions and died within a few minutes; that such death occurred before the said examination of the urethra could be made.

[fol. 42]

XI

That the said anaesthetic so administered was the usual, ordinary and proper amount for such purposes and in such cases, and that such anaesthetic was of the usual, ordinary and proper strength; and that it was properly administered.

XII

That at the time of the administration of the said anaesthetic and of the said death, the deceased was in sound physical condition, and that insured's physical condition did not contribute to his death. That no medical or surgical treatment was given to the deceased and that the said examination did not necessarily include the administration of such anaesthetic.

XIII

That the said local anaesthetic was not administered at the request of the deceased, and that the deceased did not know that such anaesthetic was going to be administered.

XIV

That at the time of the administration of said local anaesthetic the deceased had present an idiosyncracy to butyn, which said idiosyncracy was not discoverable by any test or examination and is and was so exceedingly rare that it is not taken into account as a danger in administering the said anaesthetic.

XV

That the said idiosyncracy for the said anaesthetic caused it to act in an unusual and unexpected manner, and in a manner which does not ordinarily follow and cannot be reasonably anticipated from the use thereof, and in a manner which was not intended or designed, and in a manner which was not the natural and probable consequence of such administration of butyn; that death does not ordinarily

follow and cannot be reasonably anticipated from such use of said drug; and that said death resulted on account of the said idiosyncracy. That the sole and proximate cause of the said death was such administration of said butyn to the body of deceased when deceased had such unknown idiosyncracy.

XVI

That such accident left upon the body of the deceased an external visible mark of such accident.

XVII

That an idiosyncracy of the nature of the one mentioned herein is not a bodily infirmity.

XVIII

That the death of said Ford Shane did not result from medical, mechanical or surgical treatment which was being administered to him at his request nor did it result from the intentional taking of medicine or drugs on the part of said Ford Shane, as contemplated by the terms of the said policy or certificate of insurance.

[fol. 43]

XIX

That the presence of an idiosyncracy or susceptibility to said anaesthetic on the part of the said Ford Shane was unforeseen and unexpected, in addition to being unusual and rare; and that the means which caused the death of said Ford Shane were, by reason of the said idiosyncracy, not as the insured intended or expected.

XX

That the natural and probable effect of butyn administered in the manner and in the quantity used is to induce local anaesthesia without injury to the patient; that the deceased's idiosyncracy or susceptibility to said anaesthetic was unforeseen, unknown and unexpected.

XXI

The evidence wholly fails to show that the death of Ford Shane resulted from medical, mechanical and surgical treatment, nor from the intentional taking of medicine and drugs, but that the immediate cause of death was the said idio-

syncracy and the result was the paralysis of the respiratory center; and that the result was not such as follows from ordinary means voluntarily employed in a not unusual or unexpected way.

XXII

That by the stipulation and order which are a portion of exhibit 10 the parties hereto did, prior to the commencement of this action, duly agree that the action in the District Court of the United States for the District of South Dakota in which Elizabeth Shane was plaintiff and The Order of United Commercial Travelers of America, a corporation, was defendant, and which action involved this policy of insurance might be and it was dismissed without prejudice to the commencement of another action.

Conclusions of Law

Wherefore, the Court concludes as a matter of law:

I

That plaintiff's right of action is not barred because he did not commence this action within six months from the date the claim for such benefits were disallowed by the Supreme Executive Committee; nor is plaintiff estopped to assert that the period for commencing action is not a reasonable time; and that this action was commenced within the time provided by the statutes of the State of South Dakota.

II

That the matters sued upon herein are not res adjudicata and the plaintiff is not estopped from litigating the same herein.

III

That the death of the insured, Ford Shane, was the result of external, violent and accidental means termed an accident within the meaning and contemplation of said policy or certificate of insurance; and that said death was occasioned by the said accident alone and independent of all other causes.

[fol. 44]

IV

That judgment be entered accordingly in favor of the plaintiff, Edward C. Wolfe, and against the defendant, The

Order of United Commercial Travelers of America, a corporation, upon all of the issues and for the sum of $5,000.00 with interest thereon at 7% per annum from June 8, 1931, the date the claim under said policy was disallowed by defendant, to July 1, 1933, and with interest on said $5,000.00 after July 1, 1933, at the rate of 6% per annum; and that judgment should be entered in favor of the said plaintiff and against the said defendant upon all of the issues and for the further sum of $1300.00, that being the amount due under said policy of insurance payable in weekly installments at the rate of $25.00 each, with interest on each such installment at the rate of 7% per annum from June 8, 1931, to July 1, 1933, and with interest thereon at the rate of 6% per annum from July 1, 1933, such interest to be after each such respective installment shall have become due and payable; together with plaintiff's costs and disbursements of this action.

Dated at Rapid City, South Dakota, this 1st day of January, 1944.

By the Court,

Turner M. Rudesill Judge.

Attest:

W. B. Andrus, Clerk. (Seal.)

[File endorsement omitted.]

[fols. 45-47] In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota, Within and for Pennington County

Edward C. Wolfe, Plaintiff,

vs.

The Order of United Commercial Travelers of America, a Corporation, Defendant

Judgment—Filed April 4, 1944

The above entitled action having been duly submitted to the Court, Hon. A. R. Denu, Judge, without a jury on the 5th day of February, 1942, plaintiff appearing by his at-

torney H. F. Fellows and the defendant appearing by its attorney Byron S. Payne and the said A. R. Denu having died prior to the rendition of a decision herein and it being then duly stipulated between the said attorneys that the issues herein might be submitted for determination and decision to Hon. Turner M. Rudesill, the present Judge of the Circuit Court of the Seventh Judicial Circuit upon the record of the action as it was made up for submission to the said A. R. Denu, Judge; and the said Turner M. Rudesill, Judge, having examined the record and the briefs submitted by the respective parties, and being fully advised in the premises and having made and filed findings of fact and conclusions of law constituting the decision herein; now, therefore, upon motion of H. F. Fellows, attorney for plaintiff:

It Is Hereby Ordered, Adjudged and Decreed that plaintiff, Edward C. Wolfe, have and recover judgment against the defendant, The Order of United Commercial Travelers of America, a corporation, for the sum of $5,000.00, principal sum with interest thereon at the rate of 7% per annum from June 8, 1931, the date the claim under said policy was disallowed by defendant, to July 1, 1933; and with interest on said $5,000.00 after July 1, 1933, to the date hereof at the rate of 6% per annum, making a total of such principal and interest in the sum of $8,946.87;

It Is Further Ordered, Adjudged and Decreed that plaintiff, Edward C. Wolfe, have and recover judgment against defendant, The Order of United Commercial Travelers of America, a corporation, for the further sum of $1300.00, that being the amount due under said policy of insurance payable in weekly installments at the rate of $25.00 each with interest on said sum of $1300.00 from September 8, 1932, that being the date upon which the last of said weekly installments was due and payable at the rate of 7% per annum from September 8, 1932, to July 1, 1933; and with interest on said $1300.00 after July 1, 1933, to the date of this judgment at the rate of 6% per annum, making a total of principal and interest on said weekly payments in the sum of $2,214.30;

It Is Further Ordered, Adjudged and Decreed that said plaintiff shall have judgment against said defendant for the sum of $15.00 costs and disbursements to be hereinafter

inserted by the Clerk of this Court, making a total judgment for principal, interest and costs in the sum of $11,176.17.

Dated at Rapid City, South Dakota, this 1st day of April, 1944.

By the Court.

Turner M. Rudesill; Judge.

Attest:

W. B. Andrus, Clerk. (Seal.)

[File endorsement omitted.]

(Here follows 2 photolithograph, side folios 48, 49-97)

INCORPORATED UNDER THE GENERAL LAWS OF THE STATE OF OHIO.

CLASS A

Insurance Certificate

The Order of United Commercial Travelers

OF AMERICA

COLUMBUS, OHIO.

COPY

An Association incorporated under the laws of the state of Ohio, hereby certifies that Ford Shaw, *a member of The Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an*

Insured Member of said Order under "Class A," beginning at twelve (12) o'clock, noon, Standard time, on the day this certificate is dated, and is entitled to all the rights and benefits which may be provided for such "Class A" Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date

This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between said Order and said Insured Member and shall govern the payment of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects

COPY

In Witness Whereof, *we have affixed our signatures and the seal of the Supreme Council, at*

Columbus, Ohio, this 21st *day of* December *A. D. 192*2.

THIS CERTIFICATE SUPERSEDES ALL INSURANCE CERTIFICATES ISSUED OF A PRIOR DATE BEARING THIS NUMBER.

Frank J Rosen

Supreme Counselor.

Walter D. Murphy

Supreme Secretary

COPY OF APPLICATION

Form N

This Application to be Used for Reinstatement of Members who Have Been Suspended or Withdrawn.

The Order of United Commercial Travelers of America.

APPLICATION

For reinstatement to membership as provided by Article IV, Sections 5 (Withdrawals) and 8 (Suspensions), and for Insurance as provided by Article VII, Sections 9 and 10.

To. Black Hills Council, No. 516 of Rapid City S. D.

Desiring to be reinstated to membership in, and to be insured by THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, I hereby deposit the requisite fees therefore (Two ($2.00) Dollars of which fee shall be deposited in the Assessment Fund), and I agree that my membership and insurance shall be based upon the following statement of facts, each and all of which are warranted by me to be true. I hereby subscribe for The Sample Case and stipulate that of the 25 per cent. retained from my assessments each year for the General Expense Fund, 50 cents shall be for a year's subscription to The Sample Case.

1. Name in full Ford Shane

Place of birth Mason City Iowa

Date of birth—Month August Day 9th

Year 1882 Age 40 Weight 186 Height 5' - 10"

Residence—Street Box 436 City Rapid City

State S. D.

ADDRESS WHERE YOU DESIRE YOUR MAIL SENT

Box 436 Rapid City S. D.

2. By whom are you employed? John Morrell Co.

Location—Street

City Sioux Falls State S. D.

3. In what capacity are you employed? (If more than one, state all) Traveling Salesman

State specifically the actual duties of your occupation or occupations

Selling meat to dealers

NOTE:—By the Statutes of Ohio, "the payment of death benefits shall be confined to the wife, relatives by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, step-father, step-mother, step-children, children by legal adoption, or to a person or persons dependent upon the member," and no certificate shall be made payable to "myself," "my estate," "my heirs" or "persons named in my will" or to any beneficiary other than designated by the statutes above cited.

4. Payment in case of death by accident under the provisions of the Constitution shall be made to

Beneficiary's christian and surname in full Elizabeth A Shane

Residence—Street

City Mt Vernon State S. D.

Whose relationship to me is that of Mother

5. To what Council did you belong? Black Hills No. 516

Are you suspended? Yes or withdrawn?

6. Have you ever been ruptured? No If so, do you wear and will you continue to wear a properly fitted truss?

7. Have you lost a hand or foot or are you crippled or deformed? No

If so, give full particulars

8. Is your sight or hearing impaired? No If so, give full particulars

9. Have you had Inflammatory Rheumatism, Lumbago, Syphilis, Ulcers, Varicose Veins, Cancer, any disease or disorder of the Brain, Cerebral, Meningeal or Spinal Hemorrhage, Paralysis, Locomotor Ataxia, Apoplexy, Epilepsy, Fits, Diabetes, Bright's Disease, Heart Disease, Appendicitis, or Tuberculosis in any form? No If so, give name of disease or diseases and full particulars

NOTE:—If you have had appendicitis, have you been operated upon successfully?

Date of operation

10. Do you now, or have you ever used spirituous or malt liquors to excess? No

Do you use Morphine, Opium, Cocaine, Chloral or any other narcotic?

If so, give full particulars

11. Has any Company, Association or Organization engaged in insurance rejected your application, cancelled your membership or policy, declined to reinstate you or requested you to resign? No If so, give full particulars

12. Have you any other accident insurance? Yes If so, in what companies or organizations and for what amount?

Q. C. M. A. $5.000.00

Have you named each and all of them? Yes

13. With what companies, associations or organizations, if any, have you filed claims?

None

Have you named them all? Yes

I HEREBY AGREE, With the said Order that I will comply with all the requirements of its Articles of Incorporation, Constitution, laws, rules and regulations, and that any misstatement or concealment of any fact shall cause a forfeiture of my membership and insurance in said Order, and shall also cause, as to myself, and my beneficiary or beneficiaries a forfeiture of all rights to indemnity, and to the recovery of anything whatsoever on account of any Certificate of Membership or Insurance which may be issued to me by said Order. I also agree to accept the Certificate of Insurance issued upon this Application, subject to all the provisions, conditions and limitations of the Constitutions, laws, rules and regulations of said Order as they now exist or as they may hereafter be added to, revised or amended. I hereby agree that a Certificate of Insurance issued to me shall not cover any loss, disability or death which may happen while I am under the influence of, or in consequence of having been under the influence of any intoxicating drink, or narcotic or either of them. I also agree and request that any physician, while acting in a professional capacity, may disclose or testify to any information which he may have acquired or shall hereafter acquire concerning my mental or physical condition, waiving all provisions of law to the contrary. I also agree that said Order shall not be liable for any accidental injury or death happening prior to the issuance of a Certificate of Insurance by said Order.

Ford Shane
Signature of Applicant.

Date Oct. 23, 1922

This is to certify that we are acquainted with the above named applicant and hereby recommend him for membership.

1. O. Van Wie 2. W. M. Boland
Signatures of Two Members

Received at office of Supreme Secretary Dec 12, 1922

Application accepted Dec. 21, 1922 Certificate No. 169655

NOTE.—This Application MUST be sent to the Supreme Secretary with full statement signed by the applicant, and the applicant MUST NOT BE ELECTED WITHOUT THE CONSENT OF THE SUPREME EXECUTIVE COMMITTEE, if any part of Questions Nos. 6, 7, 8, 9, 10, 11 or 12 is answered in the affirmative.

COPY

United Commercial Travelers

of America

COLUMBUS, OHIO.

CLASS A INSURANCE

Certificate No. 169655

Name Ford Shane

Member of

Black Hills Council, No. 516

of Rapid City State S.D.

Certificate issued Dec. 21, 1922

READ CAREFULLY

The Provisions of the Constitution relative to insurance will be found in Articles VI, VII and VIII, a copy of which has been sent you under separate cover. Additional copies may be obtained, upon request, from your Secretary or the Supreme Secretary.

NOTE:

This is a Fraternal Beneficial Order, operating under the Assessment Plan.

Notices of assessments mailed to the last address appearing on the books of the Supreme Secretary shall be deemed sufficient notice for all purposes.

[fol. 98] PLAINTIFF'S EXHIBIT No. 5

ASSIGNMENT

For a valuable consideration, receipt of which is hereby acknowledged, I, Elizabeth Shane, the designated beneficiary in and of policy or certificate #169655, issued by the United Commercial Travelers of Columbus (Ohio, on the life of Ford Shane, whose death occurred on or about May 8, 1931, do hereby sell, transfer, and assign to Edward C. Wolfe, a resident and citizen of the State of Ohio, as trustee, all of my right, title and interest in and to said policy and/or certificate, and any and all rights thereunder and proceeds thereof, for the death of the said Ford Shane, with authority to enforce collection thereon and thereof and to take and do all necessary steps and acts to that end, including authority to institute and prosecute action in his name, or in his and my name jointly, in any court of competent jurisdiction to collect the proceeds of said policy and/or certificate for the death of said insured.

Executed and entered into this 15th day of June, A. D., 1934.

Mrs. Elizabeth Shane.

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

Before me, a Notary Public, in and for said County and State aforesaid, appeared Elizabeth Shane, personally known to me, and executed and acknowledged the foregoing assignment as her voluntary act and deed.

H. F. Fellows, Notary Public in and for Pennington County, South Dakota. My commission expires Aug. 30, 1935. (Seal.)

STATE OF OHIO,
County of Cuyahoga, ss:

Before me a Notary Public in and for said State and County aforesaid, appeared Edward C. Wolfe, personally known to me, and on his oath acknowledged and deposed that he is a resident and citizen of the State of Ohio; and executed, accepted and acknowledged the foregoing assignment as his voluntary act and deed, this 4th day of May, 1936.

H. F. Fellows, Notary Public. My Commission expires —— ——. (Seal.)

[fol. 99] PLAINTIFF'S EXHIBIT NO. 6.

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, WITHIN AND FOR PENNINGTON COUNTY

EDWARD C. WOLFE, Plaintiff,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Defendant.

STIPULATION

It is hereby stipulated and agreed between the undersigned who are attorneys for the respective parties hereto as follows:

1. That the testimony taken at the trial of the case of Elizabeth Shane vs. The Order of United Commercial Travelers of America in the United States District Court for the Western Division of the District of South Dakota may be used as evidence upon the trial of the above entitled action, and for that purpose the printed transcript of the record in the United States Circuit Court of Appeals in said Shane case may be used.

2. That the parties hereto shall divide the expense of securing certified copies of the records in the office of the District Court of the United States for the District of South Dakota in said Shane case relating to all proceedings in such case had after decision of said Court of Appeals.

3. That the written assignment of the cause of action herein from Mrs. Elizabeth Shane to the plaintiff Edward C. Wolfe dated June 15, 1934, a copy of which has been heretofore furnished defendant's counsel, may be introduced in evidence without the necessity of taking any foundational testimony.

4. That a jury herein is hereby waived and this action may be tried to the court without a jury.

5. That the entire printed record upon appeal in said Shane case may be used by either party hereto upon the

trial hereof in lieu of the production of any testimony or exhibits therein contained.

Dated at Rapid City, South Dakota, this 1st day of October, 1934.

H. F. Fellows, Attorney for Plaintiff; Sutherland & Payne, Attorney for Defendant.

[fol. 100] PLAINTIFF'S EXHIBIT No. 7.

IN CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,
County of Pennington, ss:

EDWARD C. WOLFE, Plaintiff,

vs.

THE ORDER OF UNITED COMMERICAL TRAVELERS OF AMERICA, a Corporation, Defendant

STIPULATION

It Is Hereby Stipulated by the Plaintiff, through his attorney, H. F. Fellows, that A. W. Franklin and E. W. Dillon, if called as witnesses for the Defendant in this action, would testify as follows:

1. That they are officers of the defendant corporation, and that The Order of United Commercial Travelers of America, Defendant herein, is, and at all the times involved in this action was, a fraternal beneficiary order, association or society, organized under the Laws of the State of Ohio.

2. The application for the insurance certificate number 169,655, issued by the Defendant corporation to Ford Shane on August 19, 1920, was signed and made by the said Ford Shane in South Dakota; that the application to reinstate the said insurance certificate was signed and made by the said Ford Shane in South Dakota. That both of said applications were forwarded to the Defendant corporation at Columbus, Ohio, and the original certificate of insurance and the reinstatement certificate, dated December 24, 1922, were, alike, signed and executed by the officers of the

Defendant corporation at Columbus, Ohio, and were forwarded by the said Defendant corporation to South Dakota for delivery to the insured, the said Ford Shane.

3. That after the death of the said Ford Shane, on or about May 8, 1931, the beneficiary of said insurance, Elizabeth Shane, presented her claim, to the defendant corporation for the benefits of insurance provided for by said certificate, together with Proofs of Death of said Ford Shane in support thereof. After receipt of such claim and Proofs of Death, and on June 8, 1931, the Supreme Executive Committee refused and disallowed the claim for insurance on the life of the said Ford Shane; and, on June 11, 1931, a letter was duly [fol. 101] mailed by United States Mail to Mrs. Elizabeth Shane, said beneficiary, at Mt. Vernon, South Dakota, advising her that the Supreme Executive Committee of the Defendant corporation had disallowed claim for such insurance.

It Is Further Stipulated, on the part of the Plaintiff, that this Stipulation may be introduced and received in evidence at the trial of this action, without further foundation, as the testimony of said witnesses.

Dated this 29 day of Nov. 1941.

H. F. Fellows, Attorney for Plaintiff.

[fols. 102-103] DEFENDANT'S EXHIBIT No. 8

These Articles of Incorporation of The Order of United Commercial Travelers

Witnesseth, That we, the undersigned, all of whom are citizens of the State of Ohio, desiring to form a corporation, not for profit, under the general corporation laws of said State, do hereby certify:

First. The name of said corporation shall be Order of United Commercial Travelers.

Second. Said corporation shall be located, and its principal business transacted at Columbus, in Franklin County, Ohio.

Third. The purpose for which said corporation is formed is

First. To unite fraternally all Commercial Travelers of good moral character.

Second. To give all moral and material aid in its power to its members and those dependent on them. Also to assist the widows and orphans of deceased members.

Third. To establish an "Indemnity Fund" to indemnify its members for total disability or death resulting from accidental means.

Fourth. To secure from all Transportation Companies and Hotels, just and equitable favors for Commercial Travelers as a class.

Fifth. To elevate the moral and social standing of its members.

Sixth. Said corporation shall be a Secret Order.

In Witness Whereof, We have hereunto set our hands, this fourteenth day of January, A. D. 1888.

John C. Fenimore, L. C. Pease, S. H. Strayer, Willis E. Carpenter, John Dickey, C. S. Ammel, F. A. Sells.

[fol. 104] UNITED STATES OF AMERICA, STATE OF OHIO,
Office of the Secretary of State:

I, John E. Sweeney, Secretary of State of the State of Ohio, do hereby certify that the foregoing is an exemplified copy, carefully compared by me with the original record now in my official custody as Secretary of State, and found to be true and correct, of the Articles of Incorporation of Order of United Commercial Travelers filed in this office on the 14th day of January, A. D. 1888, and recorded in Volume 37, Page 303, of the Records of Incorporations.

Witness my hand and official seal at Columbus, Ohio, this 17th day of November, A. D. 1941.

John E. Sweeney, Secretary of State. (Seal.)

[fols. 105-133] DEFENDANT'S EXHIBIT No. 9

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 9510

At Law

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Appellant,

vs.

ELIZABETH SHANE, Appellee

Appeal from the District Court of the United States for the District of South Dakota

TRANSCRIPT OF RECORD—Filed April 25, 1932

[fol. 134] TESTIMONY OF DR. ANTON J. JANIS

ANTON J. JANIS, produced as a witness on behalf of plaintiff, testified as follows:

Direct examination:

My name is Anton J. Janis. I am a physician and surgeon, practicing at Rapid City, South Dakota. Was so practicing there on May 8th, 1931, and prior thereto. I am regularly licensed as a physician and surgeon in South Dakota, and a graduate of the college of medicine of the University of Michigan. I knew Ford Shane, the deceased, on May 8th, 1931. At that time I was connected in the practice as a physician and surgeon with Dr. Manson. I am now connected with Dr. Doyle, and was connected with Dr. Doyle on May 8th. I have been regularly associated with Dr. [fol. 135] Doyle in the practice of medicine in Rapid City, South Dakota. He and I have a common waiting room, and each a private office on opposite sides thereof.

I knew Ford Shane prior to May 8th, 1931. On that day he came to my office for an examination. He complained of urinary difficulties; he came there to see whether he had a stricture or not. At that time I attempted to make an examination for stricture; what I call a stricture of the posterior urethra. Dr. Manson was present in my office assisting in

this examination. The purpose of making the examination was to give treatment, if the condition disclosed necessitated treatment. Dr. Manson was then holding a clinic to give treatment, if the examination of certain patients, including the deceased, showed the necessity of such treatment; he would give treatment, if necessary.

The deceased came to the office about one fifteen in the afternoon. He was in apparent good health. By way of making the examination, he was placed on the surgical table,—regular genitary urinary table, and about four cc's of butyn was administered with a catheter by insertion in the urethra.

This was prior to the examination. About a minute or so after the installation of the butyn, the patient became rigid and slightly synotic. By synotic, I mean he was blue; his entire face had a sort of bluish hue. He had one convulsion; that is, I mean his entire body was rigid and it shook. And after this he had another convulsion. I then saw the patient was in a critical condition, and so I ran out and had a syringe ready. I got some adrenaline and put about five cc's of this in a syringe, and gave it to him immediately. As soon as I got through doing this, I got a two-way catheter and introduced that into his bladder and irrigated his bladder as fast as I could. That was to get all of the solution out of the bladder, or whatever got into the bladder, and from that time on, of course, I don't know how many convulsions he really had, but he had a succession of convulsions. Then his respiration practically ceased, so I gave him artificial respiration for quite a long time, and after that I alternated until the patient could not be revived.

Butyn is a cocaine derivative. It is used for a local anaesthetic. It has a tendency to numb the tissues when it comes in contact with the tissues. It acts the same as novocaine. It is practically the same except it's a trade name. I administered four cc's. I had a one per cent solution, and I usually cut the solution in half with distilled water. This is the solution I use. These were general convulsions. A succession of them, I counted at least three.

[fol. 136] The examination I was conducting did not include the administration of such an anaesthetic necessarily, or as an essential part of it. The purpose of giving the local anaesthetic is to be not too brutal to the patient, to make the examination more easy. Such an examination is made a great many times without the administration of such an an-

aesthetic; it is done daily. The surgical treatment or such examination does not depend at all upon the anaesthetic. The effect of this (anaesthetic) was not the usual effect which followed the use of such anaesthetic in such quantities and mixture. The effect was not one that could have been reasonably anticipated from the use of such mixture. He had the first convulsion about a minute and a half or two minutes after the administration of the anaesthetic. He had a succession of convulsions. He died about two minutes after.

After his death I observed blood coming from his tongue, indicating he had bitten his tongue in one of his convulsions, but otherwise the body had no marks. Patients usually bite their tongue as the result of such convulsions. This butyn was not administered at the request of Mr. Shane. I believe I stated to him that I was going to deaded his urethra for him.' I did not state what I was going to do. He did not make any inquiry of that kind. He did not request me to administer any local anaesthetic.

The cause of the convulsions which I have testified to was probably due to the idiosyncracy of the drug, the butyn. It is impossible to give an exact definition of idiosyncracy, but it is a peculiar phenomenon that happens with an organism that generally results in death in a very short while, and generally due to respiratory paralysis. It is peculiar in the organism itself. It is not a bodily infirmity or physical infirmity of any kind. (Question by counsel) Is it or is it not a term used to describe the behavior of the body when brought in contact with the drug? (Answer) Yes. There is no method that I know of by which such an idiosyncracy could be ascertained by the physician prior to the administration of the drug. There is no test to my knowledge that has ever been discovered. The patient has no way of knowing of such idiosyncracy prior to the administration of the local anaesthetic of this kind. The idiosyncracy does not affect the function of the bodily organs. I think a patient would live as long with such an idiosyncracy as without it, in the absence of coming into contact with the drugs for which he has such idiosyncracy. I did not know at the time that the physical condition of the insured, aside [fol. 137] from the idiosyncracy, contributed in any manner to his death. The symptoms and the conditions which I described are the natural symptoms, natural results of an idiosyncracy when the patient comes in contact with the drug to which he has such idiosyncracy, because I have seen

one case prior to this in which the symptoms were the same. Idiosyncracy is a peculiar action of the body that nobody really can explain. It can be hyper-susceptibility, or ultra-sensitiveness. The effect produced in this instance was not the one that ordinarily followed, or could be reasonably anticipated from the use of the anaesthetic.

The immediate cause of Mr. Shane's death was the idiosyncracy, and the result that followed was probably the paralysis of the respiratory center which resulted in death. Convulsions is one of the symptoms manifested when they have paralysis of the respiratory center. The natural or proper result of butyn administered in this manner and quantity was to anaesthetize the urethra from the anterior to the posterior portion, and render the examination practically painless, and without injury to the patient. The amount and mixture of butyn as used was the proper mixture for this purpose as recognized by the medical profession, because they can use as high as two per cent. It was the mixture and amount ordinarily used by the profession for this purpose.

When I administered the anaesthetic, I was not aware of the deceased's idiosyncracy or bodily hyper-susceptibility to the drug. There was no discussion with deceased as to the nature of any anaesthetic to be used. I stated that I would deaden his urethra, as I have stated. So far as I was concerned, the examination was confined to the genito urinal tract, and there were no other physical signs that indicated he was in poor health. Physicians and surgeons and medical authorities recognize idiosyncracies of this nature. They are very rare. When a patient has such an idiosyncracy and he is brought in contact with the drug, it results in convulsions, and paralysis of the respiratory centers, and usually in death. The physical examination which I testified I was about to make was the only occasion for the use of the drug.

Dr. James I. Doyle was called into the room after Mr. Shane had the first convulsion and prior to his death. Immediately after his death, Dr. J. M. Walsh of Rapid City, South Dakota, was called; within five minutes I think.

[fol. 138] Cross-examination:

Mr. Shane came to my office with some trouble with his urinary system. He came to consult me as a physician and surgeon. He saw Dr. Doyle first; then he came into my office. Then I was making an examination of this trouble that

he came for. That was my purpose in doing what I did. I stated to Mr. Shane that I would deaden the urethra. That was for the purpose of making the examination; and seeing what treatment was necessary. Mr. Shane made no objection at the time to deadening the tract. I might have made the examination without using the deadening drug. It is a common practice to use some drug like that to lessen the pain. I knew at the time that this drug does cause the idiosyncracy; that is general knowledge with physicians, I think. I saw a case myself on a former occasion. I don't have any exact knowledge or statistics as to the frequency that result occurs, but I know it is very rare. It does occur rarely. I should say he died in about two minutes after the drug was administered. I was quite concerned and I didn't calculate the time at all.

Redirect examination:

It is not so common that it is taken into account as a danger in administering the drug.

TESTIMONY OF DR. J. M. WALSH

DR. J. M. WALSH, produced as a witness on behalf of plaintiff, testified as follows:

Direct examination:

My name is Dr. J. M. Walsh. I am a physician and surgeon at Rapid City, South Dakota. I have practiced in South Dakota twenty-six years. I am a graduate of the school of medicine of the University of Illinois. I am duly licensed to practice in this state.

I knew Ford Shane on and prior to May 8th, 1931. I knew him very well. He had been in my office. I saw him frequently, and was quite intimately acquainted with him. On May 8th, 1931, I was called to the office of Drs. Doyle and Janis in Rapid City, South Dakota. It was right after noon. I saw Ford Shane on the operating table in Dr. Janis' office. He was dead. I examined the body. There was no physical sign or mark on the body except he was bleeding from the [fol. 139] mouth where he had bitten his tongue and lips. I examined the pupils of his eyes.

I heard the testimony of Dr. Janis as to what occurred prior to the time I came there. I am familiar with butyn and

its uses, I have not used butyn and novocaine a very great deal. They are practically the same, all but fine chemical distinctions. They belong to the cocaine group and have the same actions. They are trade names largely. Butyn and novocaine are put out for sale purposes. They are like corn whiskey and rye whiskey, a distinction rather than a difference. There is some chemical distinction, but they both act the same. They are both in the cocaine group, and depend on that group for their activity.

In my years of practice I have had experience in making examinations for strictures of the posterior urethra. I have made them a good many times. I have not used butyn or novocaine very often for that purpose. It is my practice as a rule to make them without the use of any anaesthetic. Such examination does not necessarily include the administration of either butyn or any anaesthetic. It can be made without it. It is painful. It is not a part of the examination itself, nor essential to it. The effect (of its use) is to make it more comfortable for the patient.

I know that medical authorities and physicians and surgeons recognize such a thing as an idiosyncracy or hypersusceptibility to anaesthetics of this kind, butyn and novocaine. The administration of novocaine for this kind of an examination is practically on a parity of the use of it by dentists in extracting teeth; I would say it was less necessary; the extraction of a tooth is much more painful. But the reason is the same. The idiosyncracies I have testified to are very rare. They are not a bodily infirmity; nor a physical infirmity. They do not interfere with the functions of a person's bodily organs; nor his condition of health. They are not a disease. I could not give any figures as to how rare they are. I don't know that there are such figures.

When such idiosyncracy is present it is not possible for any surgeon to tell the existence of it by tests in advance. The only way the patient may be familiar with an idiosyncracy is to have the drug administered in such small quantities that he does not die but recovers from it. Before any administration it cannot be told in any way. Idiosyncracy simply means this: it is the reaction of an individual body to this particular thing. It does not always follow that it is [fol. 140] novocaine. You get the same thing in various foods. It is well known that a person who eats strawberries may have an idiosyncracy towards them and bad results. It describes the behavior of the body; a body that reacts un-

favorably to one thing may not to another. When there is present such idiosyncracy in a person, a very small dose would produce acute poisoning. The characteristic symptoms of acute poisoning would follow any idiosyncracy. Those are acute uneasiness of the patient, abnormal heart action in which the patient becomes synotic, blue, and then convulsions which go on until death. The convulsions are successive, though they have been known to die by a single prolonged convulsion. Such a result cannot be ordinarily anticipated as following the use of such anaesthetic. The chewing of the lips, and the blue are the common result of the convulsion. They indicate when one sees the body that convulsions were present.

The amount and mixture used by Dr. Janis, as he testified, was the ordinary and proper amount and mixture as recognized by the medical profession as ordinarily used in examinations of this kind. It was a weak mixture. One-half to two per cent, his testimony was. One-half per cent of that would be perfectly safe to use, and the proper quantity. Medical authorities, physicians and surgeons generally are aware of this idiosyncracy that is present rarely. It is so rare that the authorities' recent publication made the statement that it is used actually millions of times annually in the United States, with very few direct deaths from it. I know of deaths from the idiosyncracy. It was the cause of Judge Whitings' death at Pierre not very long ago. Dr. Mead died, I think, from the same thing. Upon the testimony of Dr. Janis and my experience and knowledge, I would say the proximate, sole cause of Mr. Shane's death was acute cocaine poisoning, caused by the administration of butyn and the idiosyncracy on the part of the patient.

Cross-examination:

The purpose of injecting this drug is to deaden the pain. That is the purpose of any local anesthetic, practically always. Sometimes general anesthetic is used for muscular relaxation and such things as that. That is proper action on the part of a physician or surgeon. Today it is supposed to make it as comfortable for the patient as you can.

[fol. 141] TESTIMONY OF DR. JAMES I. DOYLE

DR. JAMES I. DOYLE, produced as a witness in behalf of plaintiff, testified as follows:

Direct examination:

My name is Dr. James I. Doyle. I am a physician and surgeon practicing at Rapid City, South Dakota. I am licensed to practice in this state. I graduated from the college of medicine of the University of Chicago. I knew Mr. Shane in his life time, nearly four years. On May 8th, 1931, he came to the office occupied by Dr. Janis and myself. Dr. Janis and I were associated at that time. I had made an appointment with him for an examination. He saw me the evening before. The examination was for stricture of the posterior urethra. He came up about five-thirty the day before for the appointment. He came to the office the next day shortly after one o'clock. He went to Dr. Janis' office. I was not there right at the time when he came, but I had seen him the evening before. I was called into Dr. Janis' office while he was there, just a minute or two before he died. Mr. Shane was then synotic, blue. It was hard to say whether his respiratories were shallow or had ceased at that time. He was in a general convulsion when I went in. I think he had three convulsions. They were so c[illegible] se together it was hard to separate them. What I would call successive convulsions. His tongue and lips were bitten. There was blood on his face. These indicated convulsions. I am familiar with the use of butyn. It is practically interchangeable with novocaine as a local anesthetic. It is of the nature testified to by Dr. Walsh and Dr. Janis.

I am familiar with making an examination for stricture of the posterior urethra. I have made them. They are made with and without local anesthetic. It is routine in offices at this date to make them with it. They are made without it. It is not an essential part of such an examination, or necessary to it; you can make it without it. It is not a part of the examination, itself. The purpose of it is to deaden the pain. The examination and surgical treatment connected with such a condition does not include in itself the administration of such an anesthetic. The surgical treatment or such an examination does not depend upon the anesthetic. In the ordinary course of the administration of such an anesthetic for such an examination, the effect that

you would get would be the patient would relax and would not complain of any pain during the examination. The symptoms I have testified are the natural result of convul- [fol. 142] sions caused by an idiosyncracy to local anesthetic. I don't know the figures on it, but I know an idiosyncracy of this kind is very rare. It is a condition recognized by medical authorities. There is no test for ascertaining the presence of such idiosyncracy prior to the use of such local anesthetic. There is no way the patient knows in advance. The result which occurred to Mr. Shane was not the one that ordinarily follows the use of such anesthetic. It was not one that could reasonably be anticipated from its use. The quantity and mixture used by Dr. Janis was the ordinary and proper amount recognized by medical authorities for use in such an examination. Basing my testimony upon Dr. Janis' testimony and my experience I would say the proximate and sole cause of Mr. Shane's death was acute poisoning followed by convulsions and idiosyncracy to butyn. I would say the idiosyncracy was the cause of the succession of events that occurred. Idiosyncracy of this nature is not a bodily infirmity. It is a descriptive term of the behavior of the body when brought into contact with the drug. I had examined Mr. Shane several times prior to May 8th, 1931. For life insurance, and I had him in an injury, a broken leg, several months ago. I made a thorough examination of him. He was in good physical condition, blood pressure normal, heart action normal. I could not find any symptoms of bodily infirmity. I saw him several times a week. He was in apparent good health on the night before his death. An idiosyncracy of this nature is so exceedingly rare that it is not taken into account as a danger in administering this drug for an examination of this kind.

Cross-examination:

But it is known that sometimes the reaction that occurred in Mr. Shane's case does occur. The purpose of giving this drug was to deaden the pain for the examination and treatment. And also to make it easier for the physician to make the examination. Relaxing tissues and muscles. The purpose is two-fold, to deaden pain and to get a relaxation of the muscles to make the examination better. This examination without an anesthetic is pretty painful. You have to go through a long duct to get into where this trouble is. The urethra lies from the bladder to the penis.

Additional Testimony of Dr. James I. Doyle

On October 13th, 1931, the following additional testimony of Dr. James I. Doyle was taken at Rapid City, South Da- [fol. 143] kota, before Florence Patterson, a notary public, and was made part of the record in the case:

Cross-examination:

I am the Dr. James I. Doyle that testified at the trial at Deadwood in September. I saw Ford Shane the day before he died. He told me he was coming up to the office to be examined the following day. I knew that he was coming to be examined for bladder trouble, or stricture. He had told me about this trouble. I had not examined him before that, but had talked with him about it. He had not consulted me professionally about it. We were quite good friends. I did not discuss that night the examination that was to be made. I saw him the next morning for just a minute on the street. He told me he would be up at one o'clock. I saw him for a minute when he came in. I made no arrangements with him as to what would be done. He came up because we had this sort of a clinic on. Dr. Janis was then associated with me. I was then busy. Janis and Manson got ready to make the examination. I had a couple of patients with me. I told Dr. Janis that forenoon or the night before that he (Shane) was coming up to be examined and I figured he had a stricture. Some notice had been given that there was to be given a clinic for trouble of this nature. I turned him over to Dr. Janis. That was the last I had to do with Mr. Shane before he was taken with convulsions.

A stricture of the urethra is caused by scar tissue laid down in the mucous membrane in the canal from previously being affected. The scar tissue in the canal cuts the caliber or size of the canal. The canal in the average person would be two to four inches; they vary a lot. This is the canal that leads from the bladder out through the penis for the discharge of the urine. The average length when there is no erection would be four or four and a half inches. It is a curved canal. You have to have a curved instrument to get all the way back to the bladder. The purpose in making an examination of this kind is to determine whether there was a stricture or strictures present. I had never examined Mr. Shane and did not know definitely about that. It was my purpose also to locate the place of the stricture. In mak-

ing an examination, what every genital urinary office does is to anesthetize the urethra in order to make the examination less painful, and then using the various instruments for determining the location and extent of the stricture or obstruction. They usually call it (the instrument) a sound or bouzee. This sound is introduced into the canal,—into the [fol. 144] penis and brought back through the urethra. It is a highly sensitized instrument, and it is curved in such shape as to accommodate itself to the canal. I ascertain where the stricture is by the obstruction that is transmitted to my hand when I introduce the instrument. I ascertain it by reaching some obstruction in the canal. That was what I was planning to do with Mr. Shane, make that sort of an examination. An examination without an anesthetic is severe and painful, quite a lot of pain connected with it, but it is not necessary to give the anesthetic in order to make the examination. It could be stood by the patient without an anesthetic if you lie him on the table.

It is right that I had made no arrangements with Mr. Shane for treating his condition. The arrangements had proceeded simply to ascertain whether he had a stricture and its location. It is a fact that a clinic for the treatment of such trouble was then being held at my office in Rapid City. Anything that we found we would naturally advise that they have treatment. There are some of them that we are treating yet. The common and usual method is to dilate the canal at the point where the stricture is found. (With) the different sounds, starts with the small sound first, and is graduated to a thousandth of an inch. That is, I start with the smaller sound and from time to time as the treatment proceeds, increase the size of it to gradually dilate the canal to its normal size. The treatment would not be much different in its operation from the original examination. Except, when I have located it (the stricture) I introduce a sound of the proper size, and then gradually introduce larger sounds as the treatment proceeds to dilate the canal.

Mr. Shane had been a patient of mine generally. I had treated him previously for other matters, for a broken leg. I use an anaesthetic for the introduction of sounds in the treatment as well as in the original examination. The purpose in both instances is to relieve the pain, and make it more comfortable for the patient.

Redirect examination:

Before entering upon the treatment, I ascertain the actual presence of stricture by introduction of a preliminary sound. And then after I find such a stricture present I commence by using a small size, gradually working up to instruments of larger size. For the purpose of dilating it to its normal size. In making an examination to ascertain the presence of a stricture, nothing further is done than to run the sound to a point where you find the presence of one. It is a fact [fols. 145-288] that his purpose in coming here was to find whether or not he had a stricture. I suspected a stricture from his history. No arrangement for any treatments were made, other than to determine the fact of the presence of a stricture. Nothing was said as to what was to be done in case I discovered the presence of stricture. That was a matter to be determined after the examination; the examination was free, without cost to the patient. In case of the discovery of an ailment of this kind, arrangements are later made for the treatment of it. The patient was given the option of going elsewhere for treatment before the examination was made, or before the examination was even commenced. This examination is no part of the treatment for stricture.

Recross-examination:

In making the examination I not only attempted to ascertain the location of the stricture, but the extent of the stricture also. You could not determine the extent of the stricture until you went on with treatment, you see. My office was giving free examinations at that time in this respect. That was for the purpose of getting patients for treatments later. In making such examinations I was attending upon them professionally. What I meant by the free part, they were not obliged to come back if they were told there was something wrong; they could go wherever they wanted to, or they could come back for treatment. The patient has the option of withdrawing from treatment at any time he sees fit.

Redirect examination:

No treatment of any ailment for Mr. Shane was undertaken at this office prior to his death.

Recross-examination:

By that I mean nothing was done other than what I have described here.

[fols. 289-291] DEFENDANT'S EXHIBIT No. 12-A

The Order of United Commercial Travelers of America

Constitution and By-laws

Governing Supreme, Grand and Subordinate Councils

Effective Sept. 1st, 1930

[fol. 292]

Constitution

Article I

Name

Section 1. This fraternity shall be known as The Order of United Commercial Travelers of America.

Objects of the Order

Sec. 2. The objects of the Order shall be:

First. To unite fraternally all Commercial Travelers and Wholesale Salesmen of good moral character.

Second. To give all moral and material aid in its power to its members and those dependent upon them, also to assist the widows and orphans of deceased members.

Third. To establish funds to indemnify its members for disability or death resulting from accidental means.

Fourth. To secure just and equitable favors for Commercial Travelers and Wholesale Salesmen as a class.

Fifth. To elevate the moral and social standing of its members.

Sixth. To establish and maintain a secret Order.

Seventh. To establish a Widows' and Orphans' Reserve Fund.

Councils

Sec. 3. For the purpose of administering the business and fraternal affairs of the Order, there shall be established and maintained subordinate Councils, Grand Councils and a Supreme Council, with such powers, rights, privileges duties and obligations as are herein provided for and as may from time to time be prescribed.

Subordinate Councils, Article II, page 4.
Grand Councils, Article V, page 46.
The Supreme Council, Article VI, page 68.

[fols. 293-312] Article II

[fol. 313] Representation

Sec. 26. Each Subordinate Council shall be entitled to one Representative in the Grand Council having jurisdiction and as many more as such Grand Council may determine, provided that the total representatives shall be apportioned among the Subordinate Councils in proportion to their membership at the end of the Subordinate Council's fiscal year.

[fols. 314-316] Article III

Funds

[fol. 317] Assessment Fund

Sec. 3. The Assessment Fund shall be created by assessments on the Insured Members of the Order in good standing, which assessments shall be paid to and held by the Subordinate Councils of such insured members until a call shall be made therefor by the Supreme Counselor as provided in Article IV, Section 1.

Distribution

Sec. 4. Whenever the Assessment Fund held by the Subordinate Councils shall be paid in under a call by the Supreme Counselor, it shall be apportioned as follows: Thirty per cent (30%) to the Death Fund; forty per cent (40%) to the Disability Fund; five per cent (5%) to the Reserve Funds, and twenty-five per cent (25%) to the General Expense Fund.

Death Fund

Sec. 5. The Death Fund shall be used only for the payment of claims for accidental death arising under Article IV, of this constitution.

[fol. 318] Article IV

Insurance

[fol. 319] The Supreme Counselor of the Order may in any given year order as many assessments and as many calls in an amount not to exceed three ($3.00) dollars each, as may be required to pay in full all valid claims against the Order and expenses incurred in maintaining the Order and conducting its business.

[fol. 320] Insurance.

Sec. 3. The Order shall indemnify its Insured Members in accordance with the terms of this Article for disability or death resulting from accidental means under two classes, namely: (A) and (B).

[fol. 321] Insured Member

Class A

Class A. Insured Members shall be indemnified in accordance with the terms hereinafter set out in this Article, against the results of bodily injury hereinafter mentioned, effected through external, violent and accidental means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes.

Benefits. Class A

Maximum benefits under Class A Insurance Certificates shall be as follows:

[fols. 322-330] Item (12). For death, $6,300.00.

Five thousand ($5,000.00) dollars of which shall be paid within ninety (90) days from the receipt by the Supreme Executive Committee of satisfactory final proofs of death and thirteen hundred ($1,300.00) dollars in weekly installments of twenty-five ($25.00) dollars each beginning within ninety (90) days from the receipt of such final proofs.

[fols. 331-335] Nor shall benefits under this Article be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability or loss.

Nor shall benefits under this Article be payable nor extend to any case of death or loss of time unless the claimant under the certificate establishes, by direct and positive proof, that said death or loss of time was caused by external violence and accidental means.

[fols. 336-396] Waivers

Sec. 11. No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee.

No Grand or Subordinate Council, officer, member or agent of any Subordinate, Grand, or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be hereafter enacted.

[fol. 397] In the Circuit Court of the Seventh Judicial Circuit of the State of South Dakota, Within and for Pennington County

Edward C. Wolfe, Plaintiff,

vs.

The Order of United Commercial Travelers of America, a Corporation, Defendant

Transcript of Trial Proceedings—Filed June 5, 1944

The above entitled cause of action coming on regularly for trial before the Court, without a jury, in the Courtroom of the Courthouse in the City of Rapid City, County of Pennington, and State of South Dakota, on the 5th day of February, A. D. 1942, before the Honorable A. R. Denu, Judge of the above named court, present and presiding, the plaintiff appearing by his attorneys, H. F. Fellows and James W. Bellamy, both of Rapid City, South Dakota and the defendant appearing by its attorney, Byron S. Payne,

Esq., of Pierre, South Dakota, the following record was made, viz:

Mr. Fellows: Plaintiff offers in evidence Exhibit "1", which is the certificate issued by the defendant company to Ford Shane, and is the policy mentioned in the complaint, the admission of the issuance of which is contained in the Answer, together with Exhibit "2", issued on the 21st day [fol. 398] of December, 1922, in which there is a change of beneficiary from the original beneficiary; together with Exhibit "3", which is a certificate of membership in the defendant, issued to Ford Shane.

It is stipulated by and between counsel for the respective parties that Exhibits "1" and "2" contain true copies of the applications of Ford Shane for the insurance certificate issued in 1920, and for the reinstatement issued in December, 1922.

Plaintiff now offers in evidence a transcript of the testimony taken in the District Court of the United States for the District of South Dakota, Western Division, in the action of Elizabeth Shane versus United Commercial Travelers, being Number 668 W. D. at Law, which transcript consists of pages 1 to 34, inclusive, which transcript is marked Exhibit "4".

We offer in evidence Exhibit "5", which is the assignment of the cause of action from Elizabeth Shane to Edward C. Wolfe, plaintiff herein.

We offer in evidence, pursuant to stipulation between the parties, Exhibit "4-A", which is a copy of the deposition of James I. Doyle, taken in the aforesaid case in Federal District Court, and not included in the transcript.

We offer in evidence Exhibit "6", which is a stipulation between the attorneys for the parties herein, dated Octo- [fol. 399] ber 1, 1934.

We offer in evidence Exhibit "7", which is also a stipulation between the parties hereto, dated November 29, 1941.

Mr. Fellows: *Plaintiff rests.*

Mr. Payne: Defendant offers in evidence Exhibit "8", an authenticated copy of the Articles of Incorporation of the defendant Company.

Defendant offers in evidence Exhibit "9", being the printed transcript of the record of the action of Elizabeth Shane against the defendant in Federal Court.

By stipulation, Defendant's Exhibit "10" is introduced into the record, being certified copies of papers and orders in the Federal Court action brought by Elizabeth Shane.

Defendant offers in evidence Exhibit "11", being a printed copy of the Opinion of the Court of the United States Circuit Court of Appeals in the action by Elizabeth Shane, which is found reported in 64 Federal (2d), page 55.

Defendant offers in evidence Exhibits "12" and "12-A" being copies of the Constitution and By-Laws of the defendant Order, and certified to by the Secretary of the Order.

[fol. 400] For the purposes of the record, defendant offers in evidence and relies upon Section 9469 of the General Code of the State of Ohio, and also Section 9473 of the General Code of the State of Ohio, and particularly the last paragraph of the last numbered section.

Mr. Fellows: I want to make an objection to the last offer in evidence of the reliance upon the Ohio statutes mentioned in the offer, for the reason that no foundation is laid; they are immaterial and irrelevant, and constitute no defense to this action.

Mr. Payne: Do you object because the printed copies of the statutes are not produced?

Mr. Fellows: No, I don't care about the copies of the printed statutes.

The Court: You are relying on the matter of relevancy, but not the foundation?

Mr. Fellows: You can strike that part of the objection that no foundation has been laid.

The Court: Very well; the objection is overruled, and the exhibits admitted.

Mr. Payne: *The defendant rests.*

Mr. Fellows: Plaintiff offers in evidence Exhibit "13", which is a carbon copy of a letter from myself to Mr. Byron S. Payne, dated December 27, 1933; Exhibit "14", which [fol. 401] is a letter from Mr. Byron S. Payne to me, in answer to the prior letter, and which is dated January 10, 1934; Exhibit "15", being a carbon copy of a letter from myself to Mr. Payne, dated January 12, 1934; and Exhibit "16", a letter from Mr. Payne to me, dated January 18, 1934.

Mr. Payne: Defendant objects on the ground the same are entirely immaterial and irrelevant and without foundation, because there is no showing that Byron S. Payne, who conducted this correspondence, had any authority to act for the

defendant company with reference to waiving any of the provisions of the Constitution and By-Laws of the defendant Order, and for no other foundational objection.

The Court: The objection is overruled, and the exhibits are admitted.

Mr. Fellows: *Plaintiff rests.*

Both sides rest.

[fol. 402] State of South Dakota,
County of Pennington, ss:

I, C. L. Howard, Official Shorthand Reporter within and for the Seventh Judicial Circuit of the State of South Dakota, Do Hereby Certify that the within and foregoing, being typewritten sheets numbered "1" to "5", both inclusive, is a true, correct and complete transcript of my shorthand notes of the record made during the trial of the within matter.

Dated at Rapid City, South Dakota, this 19th day of November, A. D. 1943.

C. L. Howard.

[File endorsement omitted.]

[fol. 403] In Circuit Court of Pennington County

[Title omitted]

Assignments of Error—Filed August 4, 1944

The Defendant assigns the following as errors committed by the trial court:

(1) The trial court erred in finding that the death of Ford Shane did not result from medical and surgical treatment, and the intentional taking of medicine and drugs as defined in the certificate of insurance involved herein. (Finding XVIII, S. R. 39.)

(2) The trial court erred in failing to find and decide that the death of Ford Shane did result from medical and surgical treatment and from the intentional taking of medicine and drugs as defined in the certificate of insurance involved herein. (Def. Requested Finding XI and Conclusion of Law IV, S. R. 29 & 31.)

(3) The trial court erred in finding and holding that the death of Ford Shane was the result of external, violent and accidental means within the meaning and contemplation of said certificate of insurance here involved. Finding of Fact V and Conclusion of Law III, S. R. 38 & 40.)

(4) The trial court erred in failing to find that the death of said Ford Shane was not caused by external, violent and accidental means as the sole cause of such death as defined in the certificate of insurance involved. (Def. Requested Finding X and Conclusion of Law III, S. R. 29 & 31.)

[fol. 404] (5) The trial court erred in failing to find and decide that the contract limitation in the insurance certificate involved, which provided that no suit nor proceeding to recover any benefits under the said insurance certificate shall be brought after six months from the date the claim for such benefits is disallowed by the Supreme Executive Committee of the corporation, was vaid, and binding on the plaintiff, and that the action was barred by such contract limitation; and it was error for the court to hold otherwise than as so requested. (Def. Requested Finding XII, and Conclusion I, and the Court's Conclusion I; S. R. 29 & 30 and 40.)

. . . . . .

[fols. 405-409] (7) The trial court erred in failing to make Findings III-a and III-b requested by the Defendant, and especially to find and hold that the contract of insurance was an Ohio Contract and is governed by the law of the State of Ohio. (S. R. 32.)

(8) The trial court erred in its findings, conclusions and judgment in failing to give effect to the law of the State of Ohio in construing the insurance contract involved, in that (a) under the undisputed facts of this case, and under the Ohio law, the death of Ford Shane was not occasioned by external, violent and accidental means; and (b) in that likewise, this action was barred because not brought within six months from the disallowance of the claim by the Supreme Executive Committee of the defendant Order.

(9) The trial court erred in its findings, conclusions and judgment, (S. R. 37 & 42) because, in construing the insurance certificate and contract involved, it did not give full

faith and credit to the public acts, records and judicial proceedings of the State of Ohio in respect to the matters set forth in the preceding assignment, and the court thereby in and by its decision violated Section 1 of Article 4 of the Constitution of the United States.

(10) The trial court erred because it did not make the findings and conclusions of law requested by the defendant, for all the reasons set forth in the preceding assignments of error, and for the reason that such requested findings and conclusions were in accord with the evidence and record of the case, and in accordance with the law governing the case. (S. R. 25 & 32.)

(11) The findings, decision and judgment of the trial court were erroneous upon all of the grounds set forth in the preceding assignments. (S. R. 25 & 32.)

Byron S. Payne, Attorney for Defendant.

[fol. 410] In Circuit Court of Pennington County

[Title omitted]

Notice of Appeal—Filed August 4, 1944

To Edward C. Wolfe, the Plaintiff Above Named, and to H. F. Fellows, His Attorney:

Please take Notice that the above named defendant, The Order of United Commercial Travelers of America, a corporation, appeals to the Supreme Court of the State of South Dakota from the judgment of the above described Circuit Court dated April 1, 1944, and filed and entered in this action on the 4th day of April, 1944, and from the whole thereof.

Dated this 31st day of July, 1944.

Byron S. Payne, Attorney for Defendant.

Service by copy of the within Notice of Appeal, together with a copy of Undertaking on Appeal, dated July 22nd, 1944, and Reporter's Transcript of the evidence and proceedings and Assignments of Error, are hereby admitted this 4th day of August, 1944.

H. F. Fellows, Attorney for Plaintiff.

[File endorsement omitted.]

[fols. 411-417] Bond on appeal for $250.00 filed Aug. 4, 1944, omitted in printing.

[fol. 418] IN THE SUPREME COURT OF SOUTH DAKOTA

EDWARD C. WOLFE, Plaintiff and Respondent,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Defendant and Appellant

Appeal from the Circuit Court of Pennington County, South Dakota

Hon. Turner M. Rudesill, Judge

Byron S. Payne, Pierre, South Dakota; E. W. Dillon, Columbus, Ohio, Attorneys for appellant.
H. F. Fellows, Rapid City, South Dakota, Attorney for respondent.

OPINION—Filed May 15, 1945

SICKEL, Judge:

The defendant is a fraternal benefit asspciation, incorporated and having its domicile in the State of Ohio. On December 21, 1922, it issued an insurance certificate to Ford Shane naming Elizabeth Shane, his mother, as beneficiary. The certificate provided for indemnity against bodily injuries effected through external, violent and accidental means. The indemnity provided for death was $5,000 cash, and $1300 in weekly installments of $25 each. On May 8, 1931, the insured visited a physician's office to be examined for stricture. The doctors applied a local anesthetic, preliminary to introducing a sound for exploratory purposes. The insured went into convulsions as a result of the anesthetic and died within about two minutes. The beneficiary then brought an action on the certificate in Pennington County. The case was removed to the United States District Court where it was tried resulting in a judgment for the plaintiff. Defendant appealed to the Circuit Court of Appeals where the judgment was reversed. Order of United Commercial Travelers v. Shane, 64 F. 2d 55.

The case was then remanded to the United States District [fol. 417] Court, and before any further proceedings were had the action was dismissed without prejudice, on stipulation of the parties. The beneficiary thereafter assigned her claim to Edward C. Wolfe who brought this action. Judgment was entered for plaintiff in the circuit court, and the defendant has appealed.

Appellant claims that this action was not commenced within six months from the time the claim on the certificate was disallowed, and that the claim is therefore barred. The constitution of the association was made a part of the certificate and provides:

> "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee."

This limitation is valid under the statutes and judicial decisions of the state of Ohio where the insurer has its domicile. Bartley v. National Business Men's Ass'n., 109 Ohio St. 585, 143 N. E. 386.

Respondent admits that this action was not commenced within six months from the time that the claim was rejected, but claims that the limitation fixed by the contract is void in this state, under SDC 10.0705 which provides:

> "Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void."

The above section of the code is a statute of general application, and it is valid. Vesey v. Commercial Union Assur. Co., 18 S. D. 632, 101 N. W. 1074; Douville v. Pacific Coast Casualty Co., 25 Idaho 396, 138 P. 506, Ann. Cas. 1917A, 112; 37 C. J., Limitation of Actions, § 45, Note 4.

The question then is whether the limitation contained in the contract, valid under the laws of Ohio where the appellant has its domicile, or the laws of South Dakota where this action was brought, are applicable in this case. If our decision is to be ruled by the contract, the action is barred. If we are to be governed by the South Dakota statute, the action is not barred. Obviously, this court will follow its own decisions and the statutes of this state, unless

if finds, as appellant claims, that the limitation contained in the contract must be upheld under the Federal Constitution, notwithstanding the laws of this state.

In Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, the following rule was stated:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

This rule applies to the whole field of conflict of laws. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477. It is not limited by the "full faith and credit" clause of the United States Constitution in any case relating to "persons and events" within the state of the forum, Pacific E. Ins. Co. v. Industrial Acci. Com., 306 U. S. 493, 59 S. Ct. 629, 83 L. Ed. 940, if the case involves rights which are contrary to local public policy, Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, 134 A. L. R. 1462; Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201, 62 S. Ct. 241, 86 L. Ed. 152; [fol. 420] Order of United Commercial Travelers v. Meinsen, (C. C. A. Eighth Cir.), 131 F. 2d 176; Anthony P. Miller, Inc. v. Needham, 122 F. 2d 710; Boyle v. Ward, 125 F. 2d 672; Kroger Grocery & Baking Co. v. Reddin, 128 F. 2d 787; Transit Bus Sales v. Kalamazoo Coaches, 145 F. 2d 804; Metropolitan Life Ins. Co. v. Haak, 50 F. Supp. 55.

The issue of law arising out of the limitation clause in this contract of insurance does not arise under the Federal Constitution nor under any Act of Congress. The defendant was, at the time it issued its certificate of membership to the insured, and at all times since has been, authorized to do business in this state as a foreign insurance corporation. The insured was a citizen of this state when he was insured by defendant, and remained such a citizen until the time of his death. The beneficiary was a resident of this state when the certificate of insurance was issued, and she has been such resident ever since. The insured died within this state, and the cause of action arose here. The action therefore relates to persons and events within this state.

The right of defendant to claim that the action is barred in this state by the terms of the contract, conflicts with SDC 1004705, quoted herein. That statute was considered in the case of Vesey v. Commercial Union Assur. Co., supra. It was held in that case that, under this statute, any stipulation in a contract which limits the time within which a party may enforce his rights thereunder, is absolutely void. That this statute is applicable to a contract made in another state and upon which an action is brought in this state was decided in the case of D. D. Powell Co. v. Larkin, 52 S. D. 245, 217 N. W. 200. There the question presented was whether an action could be brought in this state on a Nebraska contract barred by the Nebraska statute of limitations before the debtor left that state. The court said:

> "It is the general rule and the weight of authority that a statute which merely limits the time within which action may be brought upon a contract affects the remedy only, and not the right, and can have no extra-territorial effect, and will not prevent action upon the contract thereafter in the forum of some other state unless a statute of the forum so provides. * * * Whether action on the contract is barred by lapse of time must therefore be determined for the purposes of this action by the laws of South Dakota, the state of the forum, without reference to the Nebraska statute or to the existence of a bar in Nebraska."

See also Order of the United Commercial Travelers v. Meinsen, supra; Dinnie v. United Commercial Travelers, 41 N. D. 42, 169 N. W. 811; Avondale v. Sovereign Camp W. O. W., 134 Neb. 717, 279 N. W. 355; Erickson v. Order of United Commercial Travelers, 103 Kans. 831, 176 P. 989; Sternheimer v. Order of United Commercial Travelers, 107 S. C. 402, 93 S. E. 8; Hawkinson v. Order of United Commercial Travelers, (Tex. Civ. App.), 20 S. W. 2d 101.

Therefore the defendant's claim that this action is barred by the contract is contrary to the public policy of this state. So far as the Federal Constitution is concerned, the courts of this state are free to apply the statutes and decisions of this state in determining this issue.

Neither is this question ruled by the "due process" clause contained in the Fourteenth Amendment to the United States Constitution as that clause was interpreted

and applied in Home Ins. Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338, 74 L. Ed. 926, 74 A. L. R. 701, and in the case of Hartford A. & I. Co. v. Delta & Pine Land Co., 292 U. S. 143, 54 S. Ct. 634, 78 L. Ed. 1178. The Supreme Court held the "due process" clause applicable in those cases because under the facts, there was no occurrence in the state of the forum to which its laws could apply, and consequently there was no question of conflict of laws involved. This [fol. 421] distinction is pointed out in John Hancock Mut. L. Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129, 81 L. Ed. 106.

Appellant also cites Supreme Council Royal Arcanum v. Green, 237 U. S. 531, 35 S. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771; Modern Woodmen of America v. Mixer, 267 U. S. 544, 45 S. Ct. 389, 69 L. Ed. 783, 41 A. L. R. 1384; Sovereign Camp W. W. v. Bolin, 305 U. S. 66, 59 S. Ct. 35, 83 L. Ed. 45, 119 A. L. R. 478. In those cases the United States Supreme Court held that a certificate of membership in an incorporated beneficiary society establishes a complex and binding relationship, and that the rights and obligations of the members and of the society are governed by the laws of the state of incorporation, as those laws are defined and interpreted by its courts. That rule was established before the decisions in Pacific E. Ins. Co. v. Industrial Acci. Com., supra, and in the Klaxon, Griffin and Pink cases. Apparently the rule is limited by these later decisions to cases which do not relate to persons and events within the state of the forum, and in which, therefore, no question of conflict of laws is presented.

There is a further distinction. Those cases related to substantive rights and obligations of the society and its members under the insurance certificate. Here the question is in no way related to the validity of the insurance contract. It has to do with the remedy only, and in such matters the courts of the forum are free to apply the rules of the forum, notwithstanding the "full faith and credit" or "due process" clauses of the United States Constitution. Pritchard v. Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104; Klaxon Co. v. Stentor Electric Mfg. Co., supra; 37 C. J., Limitation of Actions, §§ 46 and 47.

Appellant also claims that the plaintiff is bound by the decisions of the Circuit Court of Appeals, Order of United

Commercial Travelers v. Shane, 64 F. 2d 55, and is therefore estopped from claiming that the death of Shane was occasioned by external, violent and accidental means, as provided in the insurance certificate.

After the case was reversed by the Circuit Court of Appeals and before final judgment was entered in the District Court, the action was dismissed without prejudice, on stipulation of the parties. There never was a final judgment adjudicating the rights of the parties in the federal courts. The decision of the Circuit Court of Appeals established the law of the case as to all subsequent proceedings in that action in the federal courts. However persuasive that decision might be on the questions decided, it does not govern the disposition of a new action for the same cause, brought in the state courts. Wells v. Western Union Telegraph Co., 144 Iowa 605, 123 N. W. 371; Belue v. United Commercial Travelers, 121 S. C. 179, 117 S. E. 591; Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371; 21 C. J. S., Courts, § 205, p. 365.

Appellant also assigns as error the decision of the circuit court to the effect that Shane's death was the result of external, violent and accidental means. The appellant's first contention under this assignment is that the rights and obligations of the members of the association under their contracts are governed by the laws of Ohio as defined and interpreted by the courts of that state.

This question is one of substantive right under the terms of a certificate of membership in a fraternal benefit society incorporated under the laws of Ohio. The laws of South Dakota do not conflict with the laws of Ohio as to this issue. Consequently the laws of Ohio will be observed, to the extent that they are found to be determinative of this question. Supreme Council Royal Arcanum v. Green, supra; Modern Woodmen of America v. Mixer, supra; Sovereign Camp W. W. v. Bolin, supra.

Many courts make a distinction between accidental means and accidental results. The case most often cited by the [fol. 422] courts and followed in Ohio is United States Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 S. Ct. 755, 762, 33 L. Ed. 60. In that case the insured and two companions jumped from a platform four or five feet high at

the same time and place. The companions alighted safely, but the insured suffered a stricture of the duodenum, from which he died. The question was whether the insured died as a result of accidental means, and the court said:

> "* * * If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

Another case cited in the Ohio decisions is Landress v. Phoenix Mut. L. Ins. Co., 291 U. S. 491, 54 S. Ct. 461, 78 L. Ed. 934, 90 A. L. R. 1382. In that case the facts were that the insured died as a result of a sunstroke suffered while playing golf. There the court made a restatement of the rule in the following language:

> "But it is not enough, to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man—that the result of the exposure 'was something unforeseen, unsuspected, extraordinary, an unlooked for mishap, and so an accident,' (cases cited)—for here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental."

The court held in that case that there was nothing in the sun's rays which was unknown or unforeseen by the insured, and denied liability under the policy.

In the case of New Amsterdam Casualty Co. v. Johnson, 91 Ohio St. 155, 110 N. E. 475, L. R. A. 1916B, 1018, the insured took a cold water plunge after a horseback ride. This caused an acute dilation of the heart and a long period of disability. The Ohio Supreme Court held:

> "Heart dilation following the taking of such bath when heated is a natural result from a natural cause."

and that, as a matter of law, injury did not result from accidental means. The difficulty of applying the rules is acknowledged by the court in the following statement:

> "The separation of injuries occasioned by accidental means from those occasioned by means nonaccidental is not free from difficulty, and an attempt to logically analyze every supposable case of this character and differentiate along consectary lines would lead to some contradictions."

The next Ohio case is Burns v. Employers' Liability Assur. Corp., 134 Ohio St. 222, 16 N. E. 2d 316. There the question was whether amoebic dysentery contracted from infected drinking water is a bodily injury caused by accidental means, or a disease. The court approved the Barry and Landress cases, and held that in the case under consideration the injury was not accidental.

The Ohio Supreme Court next decided the case of Mitchell v. New York Life Ins. Co., 136 Ohio St. 551, 27 N. E. 2d 243. There the insured connected a tube to a faucet and used it to administer an enema to himself thereby bursting the [fol. 423] sigmoid which caused his death. The court concluded that under the facts shown, the means were "voluntarily and intentionally employed and in the manner intended", and that means which are thus employed are not accidental.

In the case of Hassay v. Metropolitan Life Ins. Co., 140 Ohio St. 226, 43 N. E. 2d 229, the court considered a case in which the insured was killed in an explosion which wrecked a vacant house owned by him. Action was brought to recover on an accident policy. The defense claimed that the insured voluntarily and intentionally employed the means which produced his death. That is, that he caused the explosion which wrecked the house and killed him. The jury brought in a verdict for defendant and the case was affirmed on appeal.

From these cases it may be fairly concluded that the rule announced in the Barry case, as quoted herein, is the rule in Ohio. However, there seems to be no Ohio case in which the rule has been applied to a case where a drug was injected into the body of the insured for the purpose of inducing anesthesia. The rule in such cases, established by the decisions of courts in many jurisdictions, is that, if the

natural and probable effect of the drug as administered, is to induce an anesthesia without injury to the patient, and if the patient dies as a result, because of an unforeseen and unexpected idiosyncrasy, or an unusual susceptibility to the drug, then the administration of the drug was the cause of the death and the death was produced by accidental means. Mutual L. Ins. Co. v. Dodge, 41 F. 2d 486, 59 A. L. R. 1290; Taylor v. New York L. Ins. Co., 176 Minn. 171, 222 N. W. 912; Wheeler v. Title Guaranty of America, 265 Mich. 296, 251 N. W. 408; Whateott v. Continental Casualty Co., 85 Utah 406, 39 P. 2d 733; Denton v. Travelers Ins. Co., 25 F. Supp. 556; Vollrath v. Central L. Ins. Co. of Illinois, 243 Ill. App. 181; Schleicher v. General Accident, Fire & L. Assur. Corp., 240 Ill. App. 247. Since these decisions are based on the rule established in the Barry case, and since Ohio appellate courts follow that rule, we must assume that they would make a similar application of the rule in anaesthetic cases.

There is also a rule of presumption or inference which is applicable to cases involving the question of accidental means. For example, in the Barry case the only evidence of anything unexpected or unforeseen in the jump made by insured was that it sounded to his companions as if he came down heavily on his heels. Justice Blatchford said:

> "It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not."

The judgment for the plaintiff was affirmed. In the Landress case the court said:

> "Nor do we say that in other circumstances an unforeseen and hence accidental result may not give rise to the inference that the external means was also accidental."

In the Ohio case of Hassay v. Metropolitan L. Ins. Co., supra, the court said:

> "* * * Upon a showing of death by external and violent means, the law raises a presumption that death was accidental and, upon such showing aided by the presumption a prima facie case for plaintiff is made; and that the presumption remains in the case until it is overcome by evidence to the contrary. * * * A pre-

> sumption of this kind is a rebuttable one, disappearing upon the production of evidence disclosing the opposite. * * * 'And the amount of evidence required to overcome the presumption in a given case will, in general, depend on the good sense of the jury, subject, of course, to such instruction from the court, as the case may require.'"

[fols. 424-425] Plaintiff's evidence in this case was that butyn, the anesthetic, was injected into the body of insured. This was external and violent means. The evidence also shows that death resulted therefrom and that such result was unexpected and unforeseen. The result was therefore accidental. From these facts the trial court had the right to infer that the means were also accidental. The only evidence introduced in this case by the defendant to overcome the case established by plaintiff's evidence is proof that insured voluntarily submitted himself to his physician for examination and consented that a local anesthetic be administered; that butyn was administered in accordance with proper medical practice for the relief of pain; that the proper amount and strength of the drug was used; that the insured had an idiosyncrasy toward butyn; that unexpected and injurious results followed the administration of the drug; that such a result is so rare that physicians give it no consideration as a possibility. Appellant does not dispute that the injection of the drug must be considered as external and violent nor that the result was accidental. The evidence introduced by defendant is therefore insufficient to overcome the prima facie case made by the evidence of the plaintiff.

These conclusions preclude the theory that the death of insured resulted from medical or surgical treatment, or from the intentional taking of medicine or drugs.

For the reasons stated the judgment of the circuit court is affirmed.

Roberts and Rudolph, JJ., concur.

Smith, P. J., dissents.

Polley, J., not sitting.

[fol. 426] IN THE SUPREME COURT OF SOUTH DAKOTA

Present: St. Clair Smith, Presiding Judge; Samuel C. Polley, E. D. Roberts, Herbert B. Rudolph, and Vernon R. Sickel, Judges of said Court and the officers thereof:

EDWARD C. WOLFE, Plaintiff and Respondent,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a Corporation, Defendant and Appellant

JUDGMENT—May 15, 1945

This action coming on to be heard at the October A. D. 1944 Term of this Court at the Supreme Court Room in the City of Pierre, State of South Dakota, upon the merits of the case and upon oral argument by counsel, and the Court having advised thereon and filed its decision in writing.

It Is Considered, Ordered and Adjudged, that the judgment of the Circuit Court, within and for Pennington County, appealed from herein, be and the same is hereby affirmed.

And it Is Further Ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it Is Further Ordered and Adjudged, That respondent have and recover of the appellant costs and disbursements on this appeal, expended, taxed and allowed at Seventy-five and 25/100 Dollars.

By the Court, St. Clair Smith, Presiding Judge.
(Seal.)

Attest: J. W. Raish, Clerk, by ————, Deputy Clerk.

[fol. 427] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 428] Remittitur: Supreme Court, State of South Dakota. Filed June 26, 1945. J. W. Raish, Clerk.

[fol. 429] IN THE SUPREME COURT OF SOUTH DAKOTA

EXTRACT FROM DOCKET ENTRIES

June 2, 1945. Entering & Filing. Petition for Rehearing.

June 8, 1945. Entering & Filing. Answer to Petition for Rehearing.

June 26, 1945. Petition for Rehearing. Denied.

June 26, 1945. Remitted.

I, J. W. Raish, Clerk of the Supreme Court of the State of South Dakota, do hereby certify that the within and foregoing is a true and complete copy of the Entry in the Register (or Docket) of Actions in the Supreme Court of the State of South Dakota, so far as they relate to No. 8756, Edward C. Wolfe, Respondent, vs. The Order of United Commercial Travelers of America, a Corporation, Appellant, and the whole thereof.

Dated at Pierre, South Dakota, this 18th day of August, 1945.

J. W. Raish, Clerk of the Supreme Court of the State of South Dakota. (Seal.)

[fol. 430] IN SUPREME COURT OF SOUTH DAKOTA

ORDER DENYING PETITION FOR REHEARING—June 26, 1945

I, J. W. Raish, Clerk of the Supreme Court of the State of South Dakota, hereby certify that in the Journal of the Supreme Court in which is recorded the minutes of the action of the Supreme Court, relating to matters coming before it, is an entry under date of June 26, 1945, which is as follows:—

> "8756 Edward C. Wolfe, Plaintiff and Respondent v. The Order of United Commercial Travelers of America, Defendant and Appellant. Petition for Rehearing Denied."

Said entry refers to the action of the Supreme Court upon that date on the Petition for Rehearing, which had theretofore been filed by Appellant in said matter, and is the whole

of the record of the action of the Court on such Petition for Rehearing.

Dated at Pierre, South Dakota this 18th day of August, 1945.

R. W. Raish, Clerk of the Supreme Court of the State of South Dakota.

[fol. 431] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

[Title omitted]

STIPULATION AS TO CONTENTS OF THE PRINTED RECORD—Filed September 1, 1945

It is hereby stipulated by counsel for the respective parties that the following are the parts of the certified transcript of the record in the case, which are deemed essential to the questions presented by the writ of certiorari, and are to be included in the printed record: (References here are to the certified transcript of the record)

1. The Summons (R. 1), a statement showing the date and date of filing.

2. The Complaint (R. 2 and 3). Verification may be omitted. Admission of service of Summons and Complaint attached should be included.

3. Stipulation for filing amended Answer. (R. 13)

4. Amended Answer (R. 14 to 24 incl.) Paragraphs VIII and X and XII and XIII may be omitted; verification may be omitted. Date and date of filing should be shown.

5. Transcript of proceedings (R. 61 six pages). It is stipulated that all exhibits offered were admitted in evidence.

6. Exhibit 2, Insurance certificate (R. 45).

7. Exhibit 6, Stipulation dated October 1, 1934. (R. 48)

8. From Exhibit 9 (R. 51) include the testimony of Dr. Anton J. Janis, pp. 27-31; the testimony of Dr. J. M. Walsh, pp. 31-33; and the testimony of Dr. James I. Doyle, pp. 34-38.

9. Exhibit 5, (R. 47) Assignment of Claim.

10. Exhibit 7 (R. 49) Stipulation dated Nov. 29, 1941.

11. Exhibit 8 (R. 50) Certified copy of Articles of Incorporation. Acknowledgments on second page may be omitted.

12. From Exhibit 12-A (R. 35) Constitution of Petitioning Order. Include the following: From Article 1, Sections 1 and 2 and lines 23 through 29 of Section 3; from [fol. 432] Article II, lines 30 through 37 of Section 26; from Article III, Section 3 and lines 15 through 21 and to period in line 22 of Section 4, and lines 33, 34 and 35 of Section 5; from Article IV, lines 26 through 31 (page 30) of Section 1, lines 39 through 42 of Section 3, and lines 12 through 20 (page 32) and lines 21 through 28 (page 31) all of Section 4, and lines 14 through 18 and lines 23 through 29 on page 42 of Section 7; and Section 11 of Article IV.

13. Stipulation dated Nov. 29, 1943 (R. 36) Substance and effect may be stated.

14. Requested Findings of Fact and Conclusions of Law by Defendant (R. 25, seven pages). Paragraphs VIII and IX may be omitted.

15. Request by Defendant for Additional Findings (R. 32, three pages)

16. Order denying requested Findings. (R. 35)

17. Decision of Circuit Court. (R. 37 through R. 41)

18. Judgment of Circuit Court. (R. 42)

19. Notice of Appeal to the Supreme Court. (R. 66)

20. The undertaking for appeal may be omitted, but statement of filing included.

21. Assignments of Error (R. 62, three pages) No. (6) may be omitted.

22. Certified copy of Judgment of Supreme Court. (R. 68, three pages) The Statement of Costs may be omitted.

23. From the certified copy of the entries in the Register of Actions of the Supreme Court of South Dakota, include the entries of June 2, June 8, and June 26, 1945, relating to the Petition for Rehearing. (R. 69)

24. Certified copy of action of that Court on Petition for Rehearing. (R. 70)

25. This Stipulation, Also, the certificate of the Clerk of the Circuit Court to the Transcript of the Record.

Only such parts of the certified transcript of the record as are here designated are to be included in the printed record. The title of the action once given may thereafter be omitted, and formal parts of any paper not necessary to

its understanding may be omitted. The Clerk of this Court is authorized to include in the printed record any statement, or matters in the Transcript, to make the printed record complete.

The making of this stipulation shall be without prejudice to the right of either party to make objections to or in the certiorari proceedings.

Dated this 30th day of August, 1945.

Byron S. Payne, Attorney for Petitioner; H. F. Fellows, Attorney for Respondent; Edward C. Wolfe.

[fol. 433] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 434] Supreme Court of the United States

Order Extending Time Within Which to File Petition for Certiorari

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 26th, 1945.

Wiley Rutledge, Associate Justice of the Supreme Court of the United States.

Dated this 11th day of September, 1945.

[fol. 435] Supreme Court of the United States

Order Allowing Certiorari—Filed November 19, 1945

The petition herein for a writ of certiorari to the Supreme Court of the State of South Dakota is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
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OCT 23 1945
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 32

In the Supreme Court of the United States

October Term, 1945

The Order of United Commercial Travelers of America, a corporation, Petitioner,

-vs-

Edward C. Wolfe

PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

BYRON S. PAYNE, Pierre, South Dakota
E. W. DILLON, Columbus, Ohio
Attorneys for Petitioner

In the Supreme Court of the United States

October Term, 1945

No. .....

The Order of United Commercial Travelers of America, a corporation, Petitioner,

-vs-

Edward C. Wolfe

PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Order of United Commercial Travelers of America, respectfully shows as follows:

The Order of United Commercial Travelers of America hereby petitions the Honorable Court that a writ of certiorari issue to review a judgment and decision of the Supreme Court of the State of South Dakota, which affirmed a judgment of the Circuit Court in and for Pennington County, South Dakota, and which decision of the said Supreme Court was made and entered on the 15th day of May, 1945, and timely application for rehearing thereon denied on the 26th day of June, 1945. The opinion of the Supreme Court of the State is reported in 18 N. W. 2d, page 755, (R 53) and is not yet officially reported in the South Dakota Reports.

NATURE OF PROCEEDINGS BELOW

Petitioner is a fraternal benefit association organized under the laws of the State of Ohio, and having its place of business and domicile at Columbus in said State. Edward C. Wolfe, a resident and citizen of the State of Ohio, brought an action in the Circuit Court of Pennington County, South Dakota against Petitioner to recover certain death benefits on a certificate of insurance which it had issued to a member, Ford Shane. The Certificate named Ford Shane's mother, Elizabeth Shane, as beneficiary, but the claim for benefits had been assigned by her to the said Edward C. Wolfe. The Circuit Court gave judgment to Wolfe for the amount of the indemnity and interest. Petitioner then appealed to the Supreme Court of the State of South Dakota, which gave judgment on May 15, 1945 affirming the judgment of the Circuit Court. Petition for rehearing was timely made, and the Supreme Court denied this on June 26, 1945. On Sept. 11, 1945 an order was made by a Justice of this Court which extended the time for filing petition for certiorari to and including Oct. 26, 1945. (R 67). It is for the review of this final judgment of the Supreme Court that this petition is made.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under sub-division (b) of Section 237 of the Judicial Code (Section 344 of 28 U. S. Code), as amended by Act of February 13, 1925, in that a right, title, privilege and immunity was set up and claimed by Petitioner under the Constitution of the United States, and such right, title, privilege and immun-

ity, was denied to Petitioner by the decision and judgment of the Supreme Court of the State of South Dakota, which is hereby sought to have reviewed.

The particular provision of the federal Constitution under which Petitioner claims it was denied rights is Article 4, Section 1, which provides that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state"; and Petitioner claims that the judgment of the South Dakota Supreme Court did not give full faith and credit to the public acts, records and judicial proceedings of the State of Ohio. The judgment of the South Dakota court was entered May 15, 1945, and the order of the Court which denied the petition for rehearing was entered on June 26, 1945. (R 64) The Supreme Court is the highest court of the State of South Dakota, and the said judgment was a final judgment. (R 63)

SUMMARY AND STATEMENT OF MATTERS INVOLVED

Petitioner is here seeking a review of the decision and judgment of the Supreme Court of South Dakota dated May 15, 1945, in an action in that Court entitled Supreme Court Docket No. 8756, Edward C. Wolfe, Plaintiff and Respondent vs. The Order of United Commercial Travelers of America, a corporation, Defendant and Appellant. The said Edward C. Wolfe, a citizen and resident of Ohio, brought an action in the Circuit Court of Pennington County, South Dakota to recover on a certificate of insurance which said The Order of United Commercial Travelers of America, Petitioner here-

in had issued to one of its members, Ford Shane, on December 21, 1922. Ford Shane died May 8, 1931. The beneficiary in the certificate, Elizabeth Shane, claimed indemnity for his death under such certificate, and later assigned her claim to the said Wolfe. Petitioner is a fraternal benefit association organized under the laws of, and domiciled in, Ohio. It makes provision in its constitution for the payment of benefits by assessment on its members, and issues to members certificates assuring payment of such benefits. Petitioner set out in its answer in the suit that the contract of insurance provided that no suit to recover benefits shall be brought after six months from the date the claim for such benefits is disallowed by the Supreme Executive Committee of Petitioner, and that the time for bringing suit had passed; in connection therewith, Petitioner set out that Section 1 of Article 4 of the United States Constitution required that the contract of this Ohio fraternal benefit association be enforced, and claimed the benefit and protection of such provision of the Constitution. Also, Petitioner requested the trial court to hold that the contract was an Ohio contract, made by a fraternal benefit association of the State of Ohio, and should be construed according to the law of Ohio; that the hazard insured against was death from bodily injury effected through external, violent and accidental means, and that this death was not produced by such means under the law of Ohio. The circuit Court denied both contentions of Petitioner, and appeal was taken to the Supreme Court under assignments of error that the trial court had violated Section 1 of Article 4 of the United States Consti-

tution in refusing to sustain Petitioner's contentions. The South Dakota Supreme Court considered these contentions, and held against them in both instances. The facts and circumstances of the matters involved are amplified and set forth more in detail in the statement of the case in the supporting brief annexed hereto.

QUESTIONS PRESENTED

1. Does the Full Faith and Credit Clause of the United States Constitution, Section 1 of Article 4, require, under the circumstances of this case, that the provisions of the constitution of the petitioning Order, an Ohio Fraternal Benefit Association, which allows no suit to recover benefits on an insurance certificate issued to a member to be brought later than six months from the rejection of the claim, shall be recognized and enforced by the Court in South Dakota in face of a limitation statute in South Dakota which allows the suit to be brought within six years, and in face of another South Dakota statute which declares to be void any stipulation in a contract which limits the time provided by statute within which an action may be brought thereon? The State Court decided that the federal constitution did not. Petitioner claims that such decision was erroneous, and review of that decision is sought.

2. Was the South Dakota Court required by the Full Faith and Credit Clause of the Federal Constitution to construe the contract of insurance, and particularly that portion of the contract which provides indemnity shall be allowed only when the injury or death is the result of bodily injury ef-

fected through external, violent and accidental means, according to the law of Ohio as ascertained from the decisions of the Supreme Court of that State? Petitioner contended before the State Court that said provision of the Federal Constitution did so require, to which the State Court seems to have acceded. But, following this inquiry, and assuming that it should be answered in the affirmative, did the South Dakota Supreme Court err in assuming that the Ohio Court would decide that the death of Ford Shane was the result of bodily injury effected through external, violent and accidental means? Petitioner is contending that the South Dakota Court did so err, and asks a review of its decision.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The South Dakota Supreme Court has decided a substantial question of right under the Federal Constitution in a way probably not in accord with applicable decisions of this Court.

2. The grounds brought forward by the State Court to avoid the effect of the decisions of this Court have not heretofore been considered and determined by this Court. The State Court ruled that the doctrine of Supreme Council Royal Arcanum v. Green, 237 U. S. 531; M. W. of America v. Mixer, 267 U. S. 544; and Sov. Camp W. O. W. v. Bolin, 305 U. S. 66, declaring rights under membership in a fraternal benefit association, had been modified and limited by Pac. Employers Ins. Co. v. Industrial Acci. Comm., 306 U. S. 493; Griffin v. McCoach, 313 U. S. 498; and Pink v. A. A. A. Highway Express, 314 U. S. 201, so that such rights were not

protected under the full faith and credit provision of the Federal Constitution. This has not been specifically considered by this Court.

3. Petitioner interposed as a substantial defense in this action a claim of rights under the Constitution of the United States, and raised a substantial federal question before the State Court. The denial of these rights asserted as a defense will subject Petitioner to irremedial liability unless this Court assumes jurisdiction and corrects the erroneous (as we believe) ruling and decision of the state court. John Hancock Mut. L. Ins. Co. v. Yates, 299 U.S. 178, 183; Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 160.

PRAYER FOR RELIEF

Wherefore, Petitioner prays that a writ of certiorari issue out of and under the seal of this Court, which writ shall command the said State Court or Courts of South Dakota to certify and send to this Court a full and complete transcript of the record of proceedings in said Courts, including a transcript of the proceedings on the appeal to the Supreme Court of the State of South Dakota; said proceeding in the Supreme Court being numbered and entitled "Supreme Court Docket No. 8756, Edward C. Wolfe, Plaintiff vs. The Order of United Commercial Travelers of America, a corporation, defendant", to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States; and the judgment and decision of the South Dakota Supreme Court in the case be reversed by this Court, and the Peti-

tioner given such other relief as to this Court may seem proper.

Respectfully,

Byron S. Payne, Suite 3, Hyde Blk.,
Pierre, South Dakota

E. W. Dillon, 632 North Park St.,
Columbus, Ohio

Attorneys for Petitioner.

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In the Supreme Court of the United States

October Term, 1945

The Order of United Commercial Travelers of America, a corporation, Petitioner,

-vs-

Edward C. Wolfe

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of South Dakota (R 53) is reported in 18 N. W. 2d 755. It has not yet been officially reported in the South Dakota Reports.

STATEMENT OF JURISDICTION

(a) Jurisdiction of this Court is invoked under Sub-division (b) of Section 237 of the Judicial Code (§344 of 28 U. S. Code), as amended by Act of Congress of February 13, 1925, in that a right, title, privilege and immunity was set up and claimed by Petitioner under the Constitution of the United States, and such right, title, privilege and immunity was denied to Petitioner by the decision and judgment of the Supreme Court of the State of South Dakota, which is hereby sought to have reviewed.

(b) The particular provision of the Federal

Constitution under which Petitioner claims it was denied rights is Section 1 of Article 4 of the United States Constitution, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state".

(c) The judgment of the Supreme Court of the State of South Dakota sought to have reviewed is dated May 15, 1945. (R 63) A petition for rehearing was timely made and entertained by the Court, which was denied on June 26, 1945. (R 64) On Sept. 11, 1945, an order was made by a Justice of this Court which extended the time for filing petition for certiorari to and including Oct. 26, 1945. (R 67) This petition for Writ of Certiorari is presented to this Court on October , 1945. The opinion of the South Dakota Supreme Court given upon rendering the said judgment (R 53) is reported in 18 N. W.2d 735, but has not been as yet published in the official South Dakota Reports. There was no opinion given on denying the petition for rehearing.

(d) The federal question sought to be reviewed, viz: that rights were claimed by Petitioner under §1 of Article 4 of the United States Constitution and were denied to it, was first raised by Petitioner by its Answer to the Complaint filed in the trial court. (R 9). In such Answer, Petitioner set up that it was a fraternal benefit society created by the laws of the State of Ohio; that it had accepted Ford Shane as an insured member; that the constitution of the Society, which formed a part of the contract of insurance, provided that no suit for indemnity to recover bene-

fits shall be brought after six months from the date the claim for such benefits is disallowed by the supreme executive committee and that claim of the beneficiary for indemnity for the death of Ford Shane was so disallowed on June 8, 1931, and that the suit was too late and barred under the limitation in the contract; that such contract was valid under Ohio law, and was binding on the Plaintiff in his suit to recover. (R 6 to 9 .....)
Then followed this allegation:

> "That this is true because Section 1 of Article IV of the Constitution of the United States provides that 'Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state'. That defendant relies upon said provision of the United States Constitution in this action, and claims the right to be protected thereunder. That to deny that said provision of the Constitution of the defendant Order, which limits the time to bring suits on certificates of insurance to six months as aforesaid, is binding on Plaintiff and valid, would be a violation of said Section 1 of Article IV of the Federal Constitution, and a violation of defendant's rights thereunder (R 9 .....)

The trial court ignored and denied Petitioner's contention on this issue. (See Decision R 18 to 24)

Again, the Petitioner set up in its answer in the trial court that the contract of insurance provided for indemnity only when external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, dis-

ability or loss; and that external, violent and accidental means, producing bodily injury, was not the proximate, sole and only cause of the death of Ford Shane. (R 5, 6, § IX)

Petitioner asked the trial court to find and hold that the insurance contract was an Ohio contract, and was governed by the Ohio law. (R 16 .....) Petitioner asked the trial court to find and hold that the suit was barred by the six months limitation in the contract of insurance (R 12, 13 § XII) and to find and hold that the death of Ford Shane was not caused by external, violent and accidental means. (R 12 § XI .....) The trial court refused to make these findings. (R 17 ..... and 18 to 23 .....)

Petitioner filed assignments of error for the purposes of its appeal to the Supreme Court of the State of South Dakota. By such assignments, Petitioner claimed error because the trial court did not find and hold that the death of Ford Shane was not caused by external, violent and accidental means; (R 51, §§ 3 and 4 .....) and claimed error because the trial court did not find and hold that the action was barred by the six months limitation in the contract of insurance (R 51 § 5 .....) Petitioner also asserted the following as error of the trial court:

> "(8) The trial court erred in its findings, conclusions, and judgment in failing to give effect to the law of the state of Ohio in construing the insurance contract involved, in that (a) under the undisputed facts of the case, and under the Ohio law, the death of Ford

Shane was not occasioned by external, violent and accidental means; and (b) in that likewise, this action was barred because not brought within six months from the disallowance of the claim by the Supreme Executive Committee of the defendant Order. (R 51)

"(9) The trial court erred in its findings, conclusions and judgment, because in construing the insurance certificate and contract involved, it did not give full faith and credit to the public acts, records and judicial proceedings of the State of Ohio, in respect to the matters set forth in the preceding assignment, and the court thereby in and by its decision violated Section 1 of Article IV of the Constitution of the United States. (R 51 .....)"

The South Dakota Supreme Court considered the issues raised by the above assignments of error and passed upon and decided them adversely to the contention of the Petitioner. That of itself seems to be sufficient. Home Insurance Co. v. Dick, 281 U. S. 397, 407.

Thus, Petitioner interposed as a substantial defense in this action a claim of rights under the Constitution of the United States, and raised a substantial federal question before the State Court. The denial of these rights asserted as a defense will subject Petitioner to irremedial liability, unless this court assumes jurisdiction and corrects the erroneous (as we believe) ruling and decision of the state court. John Hancock Mut. L. Ins. Co. v. Yates, 299 U. S. 178, 183; Bradford Elec. Light Co. v. Clapper, 286 U. S. 145, 160.

STATEMENT OF THE CASE

Petitioner is a mutual fraternal benefit association organized under the laws of, and domiciled in, Ohio. (R 30 Ex 8, Intr. at R 48 .....) It has a lodge system with ritualistic form of work, and a representative form of government. It transacts its affairs without profit and for the mutual benefit of its members and their beneficiaries. It makes provision for the payment of benefits by assessment on its members, and issues to members certificates assuring payment of such benefits. (R 45 Ex 12-A Intr. R 49)

On December 21, 1922, it accepted Ford Shane of Rapid City, South Dakota as an insured member. (R 26-A Ex 2 .....) It issued to him an insurance certificate on that date which provided that the certificate, the Constitution, By-Laws and Articles of Incorporation of the Order, together with the application for insurance signed by said insured member, shall constitute the contract between said Order and said insured member, and shall govern the payment of benefits, and any changes, additions or amendments to said constitution, By-Laws or Articles of Incorporation hereafter duly made, shall bind said Order and said insured member and his beneficiary or beneficiaries, and shall govern and control in all respects. (R 26-A Ex 2 .....)

Section 3 of Article IV of the Constitution of the Petitioning Order provided that "insured members shall be indemnified in accordance with the terms hereinafter set out in this article against the results of bodily injury hereinafter mentioned, effected through external, violent and accidental means, herein termed the accident, which shall be

occasioned by the said accident alone and independent of all other causes". (R 46 Ex. 12-A, § 3 Art. 4) Exhibit 12-A was introduced at R 49. The indemnity for death was $5000.00 in cash and $1300.00 in weekly installments of $25.00. (R 46, Ex. 12-A, § 3 Art. 4) Section 7 of this Article IV, under the subject of exemptions, provides: "Nor shall benefits under this Article be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability or loss". (R 47, Ex. 12-A).

Section 11 of Article IV of the Constitution of said Order provided:

> "Section 11. No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for such benefits is disallowed by the Supreme Executive Committee.
>
> "No Grand or Subordinate Council, officer, member or agent of any Subordinate Council, Grand or the Supreme Council of the Order, is authorized or permitted to waive any provisions of the Constitution of this Order, relating to insurance, as the same are now in force, or may be hereafter enacted.", (R 47, Ex. 12-A,)

On May 8, 1931, the insured, Ford Shane, died. The beneficiary submitted proofs to the Order claiming that the death of Ford Shane was the result of bodily injury effected through external, violent and accidental means, and asked for the death

benefits. The claim was rejected by the Supreme Executive Committee of the Order on June 8, 1931, (R 29 Ex. 7, Intr. at 48 .....) and prompt notice sent to the beneficiary. The beneficiary, Elizabeth Shane, brought an action on the certificate which was carried to the U. S. Circuit Court of Appeals, Order of U. C. T. v. Shane, 64 Fed.2d 55 (CCA 8), and later dismissed.

The beneficiary assigned her claim to Edward C. Wolfe, a citizen and resident of Ohio. (R 27 Ex. 5, Intr. at 48 .....) In June, 1934, he brought an action on the certificate and his assignment thereof, in the Circuit Court of Pennington County, South Dakota. (R 1 and 2 .....). Judgment was given for Wolfe in the Circuit Court; (R 24 .....) from which the Order appealed to the Supreme Court; (R 52 .....) which court on May 15, 1945, gave judgment affirming the judgment of the Circuit Court. (R 63 .....)

In its answer in the suit by Wolfe in the Circuit Court, Petitioner set forth the provisions of Section 11 of Article IV of its constitution relating to the time when suits must be brought, and pleaded that the suit by Wolfe had been brought too late; (R 8 and 9 .....) Claimed that full faith and credit should be given to the provisions of the Constitution of the Order as a part of the public acts, records and judicial proceedings of the State of Ohio, and claimed the benefit of Section 1 Article IV of the United States Constitution, and asked to be protected thereunder. (R 9 .....) At the trial in the Circuit Court, the Order requested the Court to find and decide that the insurance certificate was an Ohio contract, and that the

law of Ohio governed in its construction; (R 16 .....) and that under Ohio law, the provision of its constitution that no suit should be brought after six months was a valid agreement binding on the insured and its beneficiary; (R 12, 13 § XII .....) Petitioner also asked the Court to find that under Ohio law the death of Ford Shane was not the result of bodily injury effected through external, violent and accidental means. (R 12 § X .....). The Circuit Court refused to so hold. (R 17 and 18 to 23 .....) Upon its appeal to the Supreme Court, Petitioner assigned as error the refusal of the Circuit Court to hold that suit was barred by the six months limitation in the contract, and as error the refusal of the Circuit Court to hold that the insurance certificate was an Ohio contract, and that the Ohio law governed, and that under Ohio law the death of Ford Shane was not the result of bodily injury effected through external, violent and accidental means, and that such refusal to so hold in these matters violated the rights of the Petitioner under Section 1 of Article IV of the Constitution of the United States. (R 51 § (8) and (9) .....) These issues were presented to the Supreme Court upon the appeal, and considered by the Court and decided by that court adversely to the contentions of the Order. (See opinion of the Court R 53 .....)

The circumstances of the death of Ford Shane are substantially as follows:

On May 8, 1931, he went to the offices of Doctors Doyle and Janis at Rapid City, South Dakota for the purpose of having an examination made to

ascertain if he had a stricture or obstruction of the posterior urethra. (R 32 Ex. 9, ...) Exhibit 9 was introduced at R 48. A stricture is caused by scar tissue being laid down in the canal from previous infection. The examination is made by introducing an instrument called a sound into the canal and probing until the obstruction is located. (R 41, 42 Ex. 9 .....) It is routine to make the examination with local anesthetic (R 39 Ex. 9 .....) It can be done without the use of an anesthetic, but it is extremely painful and severe on the patient. (R 40 Ex. 9 .....)

At this time, Dr. Janis placed Shane on the table, told him he was going to deaden his urethra, and for that purpose injected four cc's of butyn therein. (R 33 Ex. 9 .....) The patient immediately went into convulsions, became synotic, and in about two minutes died. (R 33 Ex. 9 .....) Butyn is a cocaine derivative, and is commonly used for local anesthesia. (R 33) The quantity used was in approved amount. (R 35, 38 Ex. 9 .....) Drs. Janis and Doyle were licensed and experienced physicians. No mishap, slip or accident is shown to have occurred in making the injection. The usual result of such use of butyn is to anesthetize the parts treated, and thus render the examination painless and without injury to the patient. (R 35 Ex. 9 .....) But this patient had a bodily condition, sometimes called an idiosyncracy, which caused it to react to the drug in an unusual and unexpected day. (R 34, 37 Ex. 9 .....) Such a reaction as here occurred is known to occur rarely, but is

so rare that the medical profession does not take it into account in administering the drug. No test can be made in advance to determine whether the idiosyncracy exists. (R 38 Ex. 9 .....) Dr. Janis, the attending physician, testified that the immediate cause of Mr. Shane's death was the idiosyncracy. (R 35 Ex. 9 .....) Dr. Doyle, also attending physician, testified that "the idiosyncracy was the cause of the succession of events that occurred". (R 40 Ex. 9, ...) The trial court found in its decision that the death "resulted on account of the idiosyncracy" and that the sole and proximate cause of the said death was such administration of said butyn to the body of deceased when deceased had such unknown idiosyncracy. (R 22 § XV)

ARGUMENT

The points and contentions we are making are set out in headlines, followed by a discussion for each one. The several headlines form a summary of the points in the argument.

I.

ENTRY INTO MEMBERSHIP OF AN INCORPORATED BENEFICIARY ASSOCIATION IS MORE THAN A CONTRACT; IT IS ENTERING INTO A COMPLEX AND ABIDING RELATION, AND THE RIGHTS OF MEMBERSHIP ARE GOVERNED BY THE LAW OF THE STATE OF INCORPORATION. ANOTHER STATE CANNOT ATTACH TO THE MEMBERSHIP RIGHTS AGAINST THE SOCIETY WHICH ARE REFUSED BY THE LAW OF THE DOMICILE, EVEN THOUGH SUCH MEMBER MAY BE A RESIDENT OF SUCH OTHER STATE.

Supreme Council Royal Arcanum v. Green, 237 U. S. 531

Modern Woodmen of America v. Mixer, 267 U. S. 544

Sov. Camp W. O. W. v. Bolin, 305 U. S. 66.

See, also, Broderick v. Rosner, 294 U. S. 629.

The above doctrine is firmly established by the above decisions and has been consistently adhered to The South Dakota Court recognized it as existing, and attempted to apply it in part to the circumstances of this case. See opinion, 18 N. W.2d at (7) page 758. (R 58)

Section 9469 of the General Code of Ohio relating to fraternal benefit societies was a part of the Ohio statute law at all times after Ford Shane took out his insurance certificate, and reads as follows:

> "**Section 9469. Certificate shall Constitute Agreement.** Every Certificate by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or if a voluntary association, the articles of association, the constitution and laws of the Society and the application for membership and medical examination signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the Society and the member, and copies of the same certified by the Secretary of the Society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to such charter or articles of incorporation, or articles of association, if a voluntary association, con-

stitution or laws duly made or created subsequent to the issuance of the benefit certificate shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership."

The last paragraph of §9473 General Code of Ohio, relating to such Societies, provides:

"**Powers of Society.** Every such society shall have the power to make a constitution and by-laws for the government of the Society, the admission of its members, the management of its affairs and the fixing and the readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to, or amend such constitution and by-laws; and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the Society."

There is no controversy about the Petitioner being a fraternal Benefit Society, or that it had the powers prescribed by the above Ohio Statutes.

II.

THE SIX MONTHS LIMITATION IN THE CONTRACT OF INSURANCE CONDITIONS THE RIGHT OF RECOVERY AGAINST, AND LIMITS THE LIABILITY OF, THE FRATERNAL BENEFIT SOCIETY, AND PERTAINS TO SUBSTANTIVE RIGHTS RATHER THAN THE REMEDY.

Home Ins. Company v. Dick, 281 U. S. 397

Dolan v. Royal Neighbors, 12 Mo. App. 147, 100 S. W. 498

Union Central Life Ins. Co. v. Barnes, 175 Ky. 364, 194 S. W. 339

It was the holding of the State Court that the question of when a suit might be brought on the certificate of insurance was a question solely of remedy which the Court of the forum was at liberty to apply under its own statutes and rules. On the authority of the cases cited on this Point in the Summary, Petitioner asserts that the six months limitation of time to sue is not a mere matter of remedy but conditions the right of recovery against and limits the liability of the Society and pertains to substantive rights. We understand that this is the view taken by this Court relating to a similar contract limitation in Home Ins. Co. v. Dick, 281 U. S. 397. In this case, the Court said relating to the contract limitation: "However characterized, it is an express term in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined". To the same effect are the other cases cited under this Point.

III.

THE CLAIMED CONFLICTING STATUTE IN SOUTH DAKOTA, (S. D. Code of 1919, Section 897, now Section 10.0705 S. D. Code of 1939) IS NOT MERELY A STATUTE OF LIMITATIONS TO FIX THE TIME WITHIN WHICH THE AID OF SOUTH DAKOTA COURTS MAY BE INVOKED; IT DECLARES VOID CONTRACTS WHICH FIX THE TIME IN WHICH SUIT MAY BE BROUGHT, AND DEALS WITH THE POWERS AND CAPACITIES OF PERSONS.

Home Ins. Co. v. Dick, 281 U. S. 397.

Said South Dakota statute reads as follows:

"Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void."

The applicable South Dakota statute prescribing the time within which an action might be brought on a contract was §33.0232 S. Dak. Code of 1939, previously §897 S. Dak. Code of 1919, which reads as follows:

"civil actions . . . can be commenced only within the following specified periods of time after the cause of action shall have accrued: (4) within six years: an action upon a contract, obligation, or liability, express or implied . . .".

Thus, if the South Dakota statute of limitation is to govern, the action was brought in time; but if the contract limitation is required to be enforced, the action was brought too late.

We point out under this number that the claimed conflicting statute (§10.0705 of the South Dakota Code of 1939) is not merely a statute of limitations, but that it declares void contracts which fix the time in which suit may be brought, and thus deals with the powers and capacities of persons to contract. The recognition and enforcement of the six months contract limitation is not the enforcement of a foreign statute of limitations, but a matter of sustaining the contract of the parties made. Dolan v. Royal Neighbors, 12 Mo. App. 147, 100 S. W. 498.

In M. W. A. v. Mixer, 267 U. S. 544, the rights at issue under the insurance certificate concerned a question of evidence, ordinarily ruled by the law of the forum. Under the Association contract contained in a by-law, "long continued absence of any member unheard of shall not . . . give any right to recover on any benefit certificate . . . until the full term of the member's expectancy of life has expired". In Nebraska where the suit was brought disappearance for ten years was sufficient to prove death. This by-law conditioned the right of recovery, and this Court held that it must be upheld in spite of the rule in Nebraska; otherwise the Plaintiff would be allowed to recover upon a state of facts denied in other jurisdictions. The situation in this case is parallel.

IV.

IN OHIO THE ESTABLISHED RULE IS THAT WHERE ONE OF HIS OWN VOLITION FOLLOWS AN INTENDED COURSE OF CONDUCT CULMINATING IN INJURY OR DEATH, THE RESULT MAY BE ACCIDENTAL, BUT NOT THE MEANS; AN EFFECT WHICH ENSUES AS A CONSEQUENCE OF A PURPOSED ACT IS NOT PRODUCED BY ACCIDENTAL MEANS.

Hassey v. Metropolitan Life Ins. Co., 140 Ohio State 266, 43 N. E.2d 229

Mitchell v. N. Y. Life Ins. Co., 136 Ohio State 551, 27 N. E.2d 243

New Amsterdam Casualty Co. v. Johnson, 91 Ohio State 155, 110 N. E. 475, L. R. A. 1916B 1018

See also, Burns v. Employers Liability Assur. Corp., 134 O. St. 222, 16 N. E.2d 316, 117 A. L. R. 733

The Ohio decisions, cited above, clearly establish a rule of construction on the language of this insurance certificate, which is that indemnity is granted only when there is bodily injury which is "effected through external, violent and accidental means". In the latest of these cases, Hassey v. Metropolitan Life Ins. Co., 140 Ohio State, supra, the rule is definitely stated in the terms of the above headlines. That Court approved an instruction of the trial court that the accident must be in the act that precedes the injury and not merely the unexpected result.

In the earlier Ohio case of Mitchell v. New York Life Ins. Co., 136 Ohio State 591, supra, the opinion quotes with approval from the opinion in Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491, as follows:

> "But it is not enough to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man—that the result of the exposure 'was something unforeseen, unsuspected, extraordinary, an unlooked for mishap, and so an accident,' (citing cases)—for here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental."

V.

THE SOUTH DAKOTA SUPREME COURT IN THIS CASE ARBITRARILY AND WITHOUT REASONABLE BASIS ASSUMED THAT THE OHIO COURT WOULD HOLD THAT THE DEATH OF FORD SHANE WAS PRODUCED BY EXTERNAL ACCIDENTAL MEANS, AND ERRONEOUSLY GAVE JUDGMENT AGAINST PETITIONER ON THIS ASSUMPTION. (R 61).

See opinion this case, 18 N. W.2d 759 (8)
See cases cited under No. IV.

The South Dakota Supreme Court in its opinion in this case does not dispute that the rule in Ohio is as stated. But the opinion goes on to say that because the courts in other jurisdictions have held that a death from the administering of anesthetic was a death effected by external accidental means, it may be assumed that the Ohio courts would do so also. This is certainly a wholly unwarranted and arbitrary assumption. Not all courts have ruled that way. There is no reason to assume that the Ohio Court would abandon the rule of construction that it has firmly established when it is applied to the circumstances of an anesthetic death. To assume this is to assume that the Ohio Court would be governed by caprice rather than by the application of the principles of construction announced.

VI.

THE SOUTH DAKOTA COURT ARBITRARILY AND WITHOUT REASONABLE BASIS ASSUMED THAT THE OHIO COURT WOULD HOLD THAT THERE WAS A PRESUMPTION THAT THE DEATH OF FORD SHANE WAS BY EXTERNAL ACCIDENTAL MEANS, IN THE ABSENCE OF EXPRESS PROOF TO THE CONTRARY; BASING SUCH ASSUMPTION ON THE HASSEY CASE IN OHIO, SUPRA, WHICH INVOLVED AN UNEXPLAINED DEATH. (R 61)

See opinion this case, 18 N. W.2d 759 (9)

In the Hassey case, 140 O. St. 266, 43 N. E.2d 229, the insured was found dead in a building wrecked by an explosion. The circumstances of the death were entirely unknown and unexplained. In such a case, says the Hassey opinion, there is a presumption that the death was accidental. In support of that statement, the opinion cites: 29 Am. Jur. p. 1082, §1443; Graham v. N. Y. Life Ins. Co., 182 Wash. 612, 619, 47 Pa.2d 1029, 1032; Mitchell v. Industrial Comm. 135 Ohio State 110, 19 N. E.2d 769. The latter two cases are suspected suicide cases, where the deaths were entirely unexplained. The reference to 29 Am. Jur., supra, contains the following:

> "In this respect, the authorities support the general rule that in an action on a policy insuring against death caused solely by external, violent and accidental means, the burden of proof is on the plaintiff to show from all the evidence that the death of the insured was the result of accidental as well as external and violent means, but that where death by unexplained, violent an dexternal means is established, a presumption is thereby created or prima facie proof is thereby made of the fact that the injuries were accidental, without direct and positive testimony on that point, since the law will not presume that the injuries were inflicted intentionally by the deceased or by some other person."

There was nothing unexplained nor mysterious about the circumstances of this death . All of the circumstances were detailed in the evidence. The

opinion states that there was no evidence to overcome the presumption of accident. This is in error. The evidence did disclose just what caused the death of Ford Shane. Dr. Janis, the attending physician, testified that the idiosyncracy was the cause of the death. Dr. Doyle testified to the same effect. The trial court so found.. The problem of the South Dakota Court was to ascertain what the Ohio Courts would hold in this situation. The only reasonable assumption is that the Ohio Court would apply the rule of presumption that the injury was accidental only in the class of cases noted in the Hassey case.

VII.

AN ERRONEOUS ASCERTAINMENT OF WHAT THE APPLICABLE LAW IN OHIO IS, AS EFFECTUALLY DENIES TO PETITIONER THE BENEFIT OF THE OHIO LAW AS IF THE SOUTH DAKOTA COURT HAD REFUSED TO APPLY THE OHIO LAW.

In order to correct the error of the State Court, this Court must have power to make its own determination of what the Ohio law is. Otherwise, it would be within the power of the state court practically to prevent a review here. Truax v. Corrigan, 257 U. S. 312.

VIII.

THE GOVERNMENTAL INTEREST OF THE STATE OF OHIO AS THE STATE OF THE DOMICILE OF THIS FRATERNAL BENEFIT ASSOCIATION UNDER THE CIRCUMSTANCES OF THIS CASE CLEARLY OUTWEIGHS AND OVERBALANCES THE INTEREST OF SOUTH DAKOTA, THE STATE OF THE FORUM; APPLYING THE DOCTRINE OF ALASKA PACKERS ASSO. v. INDUSTRIAL ACCI. COMMISSION, 294 U. S. 532; PAC. EMPLOYERS INS. CO. v. INDUSTRIAL ACCI. COMMISSION, 306 U. S. 493; KLAXON CO. v. STENTOR ELEC. MFG. CO., 313 U. S. 487; PINK v. A. A. A. HIGHWAY EXPRESS, 314 U. S. 201.

Applying the rule announced in Pink v. A.A.A. Highway Express Inc., 314 U. S. 201, and other cases cited in the Summary of this point, we analyze the respective interests of South Dakota, the state of the forum, and of Ohio, the state of the domicile of Petitioner and the state in which the contract was made.

On the part of South Dakota, one of its citizens was involved, who joined the petitioning association in South Dakota, and died there. The beneficiary named was a South Dakota citizen, but she relinquished her claim to an Ohio citizen, who brought this suit. On the authority of Hartford Acci. & Indem. Co., v. Delta & Pine Land Co., 292 U. S. 143, the fact that the insured was a resident of South Dakota, and the loss occurred there, does not give South Dakota the right to refuse to enforce this Ohio contract.

Ohio's interest comes from the facts: (1) that rights under a certificate of membership in a mutual fraternal benefit association of its creation are involved; (2) that a contract made and consummated in Ohio is involved; (3) that the suit was brought by an Ohio citizen, who left his own jurisdiction, where it was clear he could not recover, and came to South Dakota, a foreign jurisdiction, to bring his suit. Ohio should have an interest that one of its own citizens conforms to Ohio law in asserting rights against an Ohio fraternal benefit association.

This was an Ohio contract because the last act necessary to put the contract in force took place in Ohio. The insurance certificate is dated at Columbus, Ohio on December 21, 1922, and recites that the insured is admitted as an insured member at

12 o'clock noon on the day this certificate is dated. (R 26-A, Ex. 2 .....) There was nothing further to be done to put the certificate into force. Wastun v. Lincoln Nat'l Life Ins. Co., 12 F.2d 422; Young v .Order of U. C. T., 142 Neb. 566, 7 N. W. 2d 81; 45 C. J. 56 note 22; 44 C. J. S. p.509b.

There is no issue in this case as to whether Ford Shane became a member of the benefit Association, nor whether the contract for the benefits was made. These matters are admitted. The sole question at issue is as to rights which arose from the conceded membership in the association.

This is not merely a matter of requiring South Dakota to recognize a contract made in Ohio by an Ohio corporation. It involves more than a contract. It involves those rights which grow out of the complex and abiding relation which membership in a fraternal beneficiary society creates, and the necessity that those rights be administered under a single law. M. W. of America v. Mixer, supra.

An appraisal of the respective interests of South Dakota and Ohio, as indicated should be made in Alaska Packers Ass'n v. Comm'n., 294 U. S. 532, 547, shows that the interests of Ohio far outweigh and overbalance the governmental interests of South Dakota.

In the light of the foregoing contentions, we respectfully urge that the decision of the South Dakota court was erroneous, and we ask that such decision be reversed, and that Petitioner have full relief against the decision.

Respectfuly submitted,

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E. W. Dillon, Columbus, Ohio
Attorneys for Petitioner.

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No. 556

In the Supreme Court of the United States

October Term, 1945

The Order of United Commercial Travelers of America, a corporation, Petitioner,

-vs-

Edward C. Wolfe

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF OF PETITIONER

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-vs-

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ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF OF PETITIONER

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of South Dakota (R 53) is reported in 18 N. W. 2d 755. It has not yet been officially reported in the South Dakota Reports.

STATEMENT OF JURISDICTION

(a) Jurisdiction of this Court is invoked under Sub-division (b) of Section 237 of the Judicial Code (§344 of 28 U. S. Code), as amended by Act of Congress of February 13, 1925, in that a right, title, privilege and immunity was set up and claimed by Petitioner under the Constitution of the United States, and such right, title, privilege and immunity was denied to Petitioner by the decision and judgment of the Supreme Court of the State of South Dakota, which is hereby sought to have reviewed.

(b) The particular provision of the Federal Constitution under which Petitioner claims it was denied rights is Section 1 of Article 4 of the United States Constitution, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state".

(c) The judgment of the Supreme Court of the State of South Dakota sought to have reviewed is dated May 15, 1945. (R 63) A petition for rehearing was timely made and entertained by the Court, which was denied on June 26, 1945. (R 64) On Sept. 11, 1945, an order was made by a Justice of this Court which extended the time for filing petition for certiorari to and including Oct. 26, 1945. (R 67) This petition for Writ of Certiorari was presented to this Court on October 23, 1945. The opinion of the South Dakota Supreme Court given upon rendering the said judgment (R 53) is reported in 18 N. W.2d 755, but has not been as yet published in the official South Dakota Reports. There was no opinion given on denying the petition for rehearing.

A statement was made in the brief in support of the Petition for Certiorari (pp. 2 to 5) showing the stage and the manner in which the Federal questions were raised in the lower courts, and passed upon by such courts, and is not repeated here for brevity. Reference is made to such statement in such brief for those matters.

STATEMENT OF THE CASE

Petitioner is a mutual fraternal benefit association organized under the laws of, and domiciled in, Ohio. (R 30 Ex 8, Intr. at R 48) It has a lodge system with ritualistic form of work, and a representative form of government. It transacts its affairs without profit and for the mutual benefit of its members and their beneficiaries. It makes provision for the payment of benefits by assessment on its members, and issues to members certificates assuring payment of such benefits. (R 45 Ex 12-A Intr. R 49)

On December 21, 1922, it accepted Ford Shane of Rapid City, South Dakota as an insured member. (R 26-A Ex 2) It issued to him an insurance certificate, on that date which provided that the certificate, the Constitution, By-Laws and Articles of Incorporation of the Order, together with the application for insurance signed by said insured member, shall constitute the contract between said Order and said insured member, and shall govern the payment of benefits, and any changes, additions or amendments to said constitution, By-Laws or Articles of Incorporation hereafter duly made, shall bind said Order and said insured member and his beneficiary or beneficiaries, and shall govern and control in all respects. (R 26-A Ex 2)

Section 3 of Article IV of the Constitution of the Petitioning Order provided that "insured members shall be indemnified in accordance with the terms hereinafter set out in this article against the results of bodily injury hereinafter mentioned, effected through external, violent and accidental

means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes". (R 46 Ex. 12-A, § 3 Art. 4) Exhibit 12-A was introduced at R 49. The indemnity for death was $5000.00 in cash and $1300.00 in weekly installments of $25.00. (R 46, Ex. 12-A, § 3 Art .4) Section 7 of this Article IV, under the subject of exemptions, provides: "Nor shall benefits under this Article be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability or loss". (R 47, Ex. 12-A)

Section 11 of Article IV of the Constitution of said Order provided:

> "Section 11. No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for such benefits is disallowed by the Supreme Executive Committee.
>
> "No Grand or Subordinate Council, officer, member or agent of any Subordinate Council, Grand or the Supreme Council of the Order, is authorized or permitted to waive any provisions of the Constitution of this Order, relating to insurance, as the same are now in force, or may be hereafter enacted." (R 47, Ex. 12-A)

On May 8, 1931, the insured, Ford Shane, died. The beneficiary submitted proofs to the Order claiming that the death of Ford Shane was the result of bodily injury effected through external, violent and accidental means, and asked for the death benefits. The claim was rejected by the Supreme

Executive Committee of the Order on June 8, 1931, (R 29 Ex 7, Intr. at 48) and prompt notice sent to the beneficiary. The beneficiary, Elizabeth Shane, brought an action on the certificate which was carried to the U. S. Circuit Court of Appeals, Order of U. C. T. v. Shane, 64 Fed.2d 55 (CCA 8), and later dismissed.

The beneficiary assigned her claim to Edward C. Wolfe, a citizen and resident of Ohio. (R 27 Ex. 5, Intr. at 48) In June, 1934, he brought an action on the certificate and his assigment thereof, in the Circuit Court of Pennington County, South Dakota. (R 1 and 2) Judgment was given for Wolfe in the Circuit Court; (R 24) from which the Order appealed to the Supreme Court; (R 52) which court on May 15, 1945, gave judgment affirming the judgment of the Circuit Court. (R 63)

In its answer in the suit by Wolfe in the Circuit Court, Petitioner set forth the provisions of Section 11 of Article IV of its constitution relating to the time when suits must be brought, and pleaded that the suit by Wolfe had been brought too late; (R 8 and 9) Claimed that full faith and credit should be given to the provisions of the Constitution of the Order as a part of the public acts, records and judicial proceedings of the State of Ohio, and claimed the benefit of Section 1 Article IV of the United States Constitution, and asked to be protected thereunder. (R 9) At the trial in the Circuit Court, the Order requested the Court to find and decide that the insurance certificate was an Ohio contract, and that the law of Ohio governed in its construction; (R 16) and that under Ohio law, the

provision of its constitution that no suit should be brought after six months was a valid agreement binding on the insured and its beneficiary; (R 12, 13 § XII) Petitioner also asked the Court to find that under Ohio law the death of Ford Shane was not the result of bodily injury effected through external, violent and accidental means. (R 12 § X) The Circuit Court refused to so hold. (R 17 and 18 to 23) Upon its appeal to the Supreme Court, Petitioner assigned as error the refusal of the Circuit Court to hold that suit was barred by the six months limitation in the contract, and as error the refusal of the Circuit Court to hold that the insurance certificate was an Ohio contract, and that the Ohio law governed, and that under Ohio law the death of Ford Shane was not the result of bodily injury effected through external, violent and accidental means, and that such refusal to so hold in these matters, violated the rights of Petitioner under Section 1 of Article IV of the Constitution of the United States. (R 51 § (8) and (9) These issues were presented to the Supreme Court upon the appeal, and considered by the Court and decided by that court adversely to the contentions of the Order. (See opinion of the Court R 53)

That the Court considered and passed upon these issues seems to justify the review by this court. Home Ins. Co. v. Dick, 281 U. S. 397,407.

The circumstances of the death of Ford Shane are substantially as follows:

On May 8, 1931, he went to the offices of Doctors Doyle and Janis at Rapid City, South Dakota for the purpose of having an examination made to

ascertain if he had a stricture or obstruction of the posterior urethra. (R 32 Ex. 9) Exhibit 9 was introduced at R 48. A stricture is caused by scar tissue being laid down in the canal from previous infection. The examination is made by introducing an instrument called a sound into the canal and probing until the obstruction is located. (R 41, Ex. 9) It is routine to make the examination with local anesthetic (R 39 Ex 9) It can be done without the use of an anesthetic, but it is extremely painful and severe on the patient. (R 40 Ex. 9)

At the time, Dr. Janis placed Shane on the table, told him he was going to deaden his urethra, and for that purpose injected four cc's of butyn therein. (R 33 Ex. 9) The patient immediately went into convulsions, became synotic, and in about two minutes died. (R 33 Ex. 9) Butyn is a cocaine derivative, and is commonly used for local anesthesia. (R 33) The quantity used was in approved amount. (R 35, 38 Ex. 9) Drs. Janis and Doyle were licensed and experienced physicians. No mishap, slip or accident is shown to have occurred in making the injection. The usual result of such use of butyn is to anesthetize the parts treated, and thus render the examination painless and without injury to the patient. (R 35 Ex. 9) But this patient had a bodily condition, sometimes called an idiosyncracy, which caused it to react to the drug in an unusual and unexpected way. (R 34, 37 Ex. 9) Such a reaction as here occurred is known to occur rarely, but is so rare that the medical profession does not take it into account in administering the drug. No test can be made in advance to determine whether the idiosyncracy exists. (R 38 Ex. 9) Dr. Janis, the at-

tending physician, testified that the immediate cause of Mr. Shane's death was the idiosyncracy. (R 35 Ex. 9) Dr. Doyle, also attending physician, testified that "the idiosyncracy was the cause of the succession of events that occurred". (R 40 Ex. 9) The trial court found in its decision that the death "resulted on account of the idiosyncracy" and that the sole and proximate cause of the said death was such administration of said butyn to the body of deceased when deceased had such unknown idiosyncracy. (R 22 § XV)

QUESTIONS PRESENTED

The questions presented by the record and of which a review is sought are stated in the petition for certiorari as follows:

1. Does the Full Faith and Credit Clause of the United States Constitution, Section 1 of Article 4, require, under the circumstances of this case, that the provisions of the constitution of the petitioning Order, and Ohio Fraternal Benefit Association, which allows no suit to recover benefits on an insurance certificate issued to a member to be brought later than six months from the rejection of the claim, shall be recognized and enforced by the Court in South Dakota in face of a limitation statute in South Dakota which allows the suit to be brought within six years, and in face of another South Dakota statute which declares to be void any stipulation in a contract which limits the time provided by statute within which an action may be brought thereon? The State Court decided that the federal constitution did not. Petitioner claims

that such decision was erroneous, and review of that decision is sought.

2. Was the South Dakota Court required by the Full Faith and Credit Clause of the Federal Constitution to construe the contract of insurance, and particularly that portion of the contract which provides indemnity shall be allowed only when the injury or death is the result of bodily injury effected through external, violent and accidental means, according to the law of Ohio as ascertained from the decisions of the Supreme Court of that State? Petitioner contended before the State Court that said provision of the Federal Constitution did so require, to which the State seems to have acceded. But, following this inquiry, and assuming that it should be answered in the affirmative; did the South Dakota Supreme Court err in assuming that the Ohio Court would decide that the death of Ford Shane was the result of bodily injury effected through external, violent and accidental means? Petitioner is contending that the South Dakota Court did so err, and asks a review of its decision.

ARGUMENT

The points and contentions we are making are set out in headlines, followed by a discussion for each one. The several headlines form a summary of the points in the argument.

I.

ENTRY INTO MEMBERSHIP OF AN INCORPORATED BENEFICIARY ASSOCIATION IS MORE THAN A CONTRACT; IT IS ENTERING INTO A COMPLEX AND ABIDING RELATION, AND THE RIGHTS OF MEMBERSHIP ARE GOVERNED BY THE LAW OF THE STATE OF INCORPORATION. ANOTHER STATE CANNOT ATTACH TO THE MEMBERSHIP RIGHTS AGAINST THE SOCIETY WHICH ARE REFUSED BY THE LAW OF THE DOMICILE, EVEN THOUGH SUCH MEMBER MAY BE A RESIDENT OF SUCH OTHER STATE.

Supreme Council Royal Arcanum v. Green, 237 U. S. 531

Modern Woodmen of America v. Mixer, 267 U. S. 544

Sov. Camp W. O. W. v. Bolin, 305 U. S. 66

See, also Broderick v. Rosner, 294 U. S. 629

The above doctrine is firmly established by the above decisions and has been consistently adhered to. The South Dakota Court recognized it as existing, and attempted to apply it in part to the circumstances of this case. See opinion, 18 N. W.2d at (7) page 758. (R 58)

Section 9469 of the General Code of Ohio, relating to fraternal benefit societies was a part of the Ohio statute law at all times after Ford Shane took out his insurance certificate, and reads as follows:

"Section 9469. Certificate shall Constitute Agreement. Every Certificate by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or if a voluntary association, the articles of association, the constitution and laws of the Society and the application for membership and medical examination signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the Society and the member, and copies of the same certified by the Secretary of the Society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to such charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or created subsequent to the issuance of the benefit certificate shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership."

The last paragraph of §9473 General Code of Ohio, relating to such Societies, provides:

"Powers of Society. Every such society shall have the power to make a constitution and by-laws for the government of the Society, the admission of its members, the management of its affairs and the fixing and the readjusting

of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to, or amend such constitution and by-laws, and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the Society."

South Dakota Code of 1939, § 36.0702, provides that every court of the state shall take judicial notice of the common law and statutes of every state of the United States.

There is no controversy about the Petitioner being a fraternal Benefit Society, or that it had the powers prescribed by the above Ohio Statutes.

II.

THE SIX MONTHS LIMITATION IN THE CONTRACT OF INSURANCE CONDITIONS THE RIGHT OF RECOVERY AGAINST, AND LIMITS THE LIABILITY OF, THE FRATERNAL BENEFITS SOCIETY, AND PERTAINS TO SUBSTANTIVE RIGHTS RATHER THAN THE REMEDY.

Home Ins. Company v. Dick, 281 U. S. 397
Dolan v. Royal Neighbors, 112 Mo. App. 147, 100 S. W. 498
Union Central Life Ins. Co. v. Barnes, 175 Ky. 364, 194 S. W. 339

It was the holding of the State Court that the question of when a suit might be brought on the certificate of insurance was a question solely of remedy which the Court of the forum was at liberty to apply under its own statutes and rules. On the authority of the cases cited on this point in the Summary, Petitioner asserts that the six months

limitation of time to sue is not a mere matter of remedy but conditions the right of recovery against and limits the liability of the Society and pertains to substantive rights. We understand that this is the view taken by this Court relating to a similar contract limitation in Home Ins. Co. v. Dick, 281 U. S. 397. In this case, the Court said relating to the contract limitation: "However characterized, it is an express term in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined". To the same effect are the other cases cited under this Point.

The South Dakota Court seems to attach some significance that the petitioning order had been admitted to transact business in South Dakota as a foreign society. (R55) Wolfe v. Order of U. C. T. of America, 18 N. W. 2d 755, 757 [3]. While there was nothing in the record to show whether or not the petitioning order had been admitted to transact business in S. D., yet the statute so required, and it would be presumed that the requirements of the statute had been complied with.

In 1919 the legislature of S. D. passed as Chapter 232, Laws of 1919, an act which was entitled "An act providing for the regulation and control of all fraternal benefit societies". Section 16 of this act provided for the admission of a foreign society. It has now been incorporated into the S. D. Code of 1939 as Sec. 31.2124 and reads as follows:

> "No foreign society shall transact any business herein without a license from the Commissioner. Any such society shall be entitled to a

license to transact business within this state upon filing with the Commissioner a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officers; a power of attorney to the Commissioner as hereinafter provided; a statement of its business under oath of its president and secretary, or corresponding officers, in the form required by the Commissioner, duly verified by an examination made by the supervising insurance official of its home state or other state satisfactory to the Commissioner; a certificate from the proper official in its home state, province, or country, that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical or other payments by persons holding similar contracts; and upon furnishing the Commissioner such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the state, territory, district, province, or country where it is organized, he shall issue a license to such society to do business in this state until the first day of the succeeding March, and such license shall, upon compliance with the provisions of this chapter, be renewed annually, but in all cases to terminate on the first day of the succeeding March; provided however, that such license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign

society desiring admission to this state, shall have the qualifications required of domestic societies organized under this chapter, upon a valuation by any one of the standards authorized in Section 31.2133, and have its assets invested as required by the laws of the state, territory, district, country, or province where it is organized."

Said Chapter 232 of the Laws of 1919 also contains a Section numbered 4, which now appears as Section 31.2104 of the S. D. Code of 1939, and reads as follows:

31.2104 Exemption. Except as otherwise specifically provided, such societies shall be governed by this chapter, and shall be exempt from all provisions of the other insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein.

Thus there is legislative consent and sanction that a foreign fraternal benefit society may transact its business and issue its contract which the law of its domicile authorized it to issue. No South Dakota statute at any time has been passed which modifies the above statutes.

III.

THE SIX MONTHS LIMITATION IS VALID UNDER THE LAWS OF OHIO, AND IS AN OHIO CONTRACT.

No contention is made that the six months limitations in the insurance contract is not valid

under the laws of Ohio. The South Dakota Court so found in its opinion that it was valid in Ohio, citing Bartley v. National Business Men's Association, 109 O. St. 585, 143 N. E. 386. (R 54). See Young v. Order of U. C. T., 142 Neb. 566, 7 N. W. 2d, 81, 83.

The insurance contract was an Ohio contract because the last act necessary to put the contract in force took place in Ohio. The application for the insurance was signed by the insured and forwarded to the Petitioner at Columbus, Ohio. The insurance certificate, which is dated December 21, 1922 was executed by the officers of the petitioner at Columbus, Ohio, and was forwarded to the insured in South Dakota. (R 29) This certificate recites that the insured "is hereby accepted as an insured member of said order under class A, beginning at twelve (12) o'clock noon, standard time, on the day this certificate is dated, and is entitled to all rights and benefits which may be provided for such insured member in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date". (R 26A) There was nothing further to be done to put the certificate into force. This made it an Ohio contract. Wastun v. Lincoln Nat'l Life Ins. Co., 12 F.2d 422; Young v. Order of U. C. T., 142 Neb. 566, 7 N. W. 2d 81; 45 C. J. 56 note 22; 44 C. J. S. p 509b.

IV.

THE CLAIMED CONFLICTING STATUTE IN SOUTH DAKOTA, (S. D. Code of 1919, Section 897, now Section 10.0705 S. D. Code of 1939) IS NOT MERELY A STATUTE OF LIMITATIONS TO FIX THE TIME WITHIN WHICH THE AID OF SOUTH DAKOTA COURTS MAY BE INVOKED: IT DECLARES VOID CONTRACTS WHICH FIX THE TIME IN WHICH SUIT MAY BE BROUGHT, AND DEALS WITH THE POWERS AND CAPACITIES OF PERSONS.

Home Ins. Co. v. Dick, 281 U. S. 397.

Said South Dakota statute reads as follows:

> "Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void."

The applicable South Dakota statute prescribing the time within which an action might be brought on a contract was §33.0232 S. Dak. Code of 1939, previously §879 S. Dak. Code of 1919, which reads as follows:

> "civil actions . . . can be commenced only within the following specified periods of time after the cause of action shall have accrued: (4) within six years: an action upon a contract, obligation, or liability, express or implied . . .".

Thus, if the South Dakota statute of limitation is to govern, the action was brought in time; but if the contract limitation is required to be enforced, the action was brought too late.

We point out under this number that the claimed conflicting statute (§10.0705 of the South Da-

kota Code of 1939) is not merely a statute of limitations, but that it declares void contracts which fix the time in which suit may be brought, and thus deals with the powers and capacities of persons to contract. The recognition and enforcement of the six months contract limitation is not the enforcement of a foreign statute of limitations, but a matter of sustaining the contract of the parties made. Dolan v. Royal Neighbors, 112 Mo. App. 147, 100 S. W. 498.

In M. W. A. v. Mixer, 267 U. S. 544, the rights at issue under the insurance certificate concerned a question of evidence, ordinarily ruled by the law of the forum. Under the Association contract contained in a by-law, "long continued absence of any member unheard of shall not . . . give any right to recover on any benefit certificate . . . until the full term of the member's expectancy of life has expired". In Nebraska where the suit was brought disappearance for ten years was sufficient to prove death. This by-law conditioned the right of recovery, and this Court held that it must be upheld in spite of the rule in Nebraska; otherwise the Plaintiff would be allowed to recover upon a state of facts denied in other jurisdictions. The situation in this case is parallel.

V.

BECAUSE OF THE RELATION CREATED BY MEMBERSHIP IN A FRATERNAL BENEFIT SOCIETY, AND THE NECESSITY THAT RIGHTS BE GOVERNED BY A SINGLE LAW, THE FULL FAITH AND CREDIT CLAUSE REQUIRED THAT SOUTH DAKOTA ENFORCE THE OHIO LAW AND CONTRACT.

It cannot be said that South Dakota has any uniform policy as to the time within which suits must be brought on insurance contracts. It is true that Sec. 31.1610 S. D. Code of 1939 prohibits a life insurance policy from containing a provision "limiting the time within which any action at law or in equity may be commenced to less than six years after the cause of action shall accrue". But the South Dakota statute, regulating the contents of health and accident policies, Chapter 31.17 of the 1939 Code, first enacted in 1919, provides that such a policy shall contain a standard provision limiting the time within which suit may be brought upon the policy, as follows: "No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy". See Sec. 31.1702 (14). The statute further provides, Sec. 31.1708 (3), that it does not apply to transactions of fraternal benefit societies. But the South Dakota fraternal benefit society statute (Chap. 31.21, S. D. Code of 1939) has no special provision regarding when actions on its certificates may be brought. The effect of the South Dakota statutes seems to be that contracts of fraternal benefit societies are subject to the general statutes of limitations, Sec. 33.0232, S. D. Code of 1939; and that a South Dakota fraternal benefit society would be prohibited from contracting for a less period under Sec. 10.0705 S. D. Code of 1939. No reason is

apparent why the period for bringing suit against a fraternal benefit society on an accident policy is six years, while the period is two years when the policy is issued by other class of company. Since it is the established rule that a contract of a fraternal benefit society must be governed by the single law of the domicile of such society, we cannot see how the local or municipal law in South Dakota will be disturbed, or disorganized by requiring South Dakota to recognize and enforce the Ohio law. A South Dakota citizen would have the same right as the citizen of another state. Likewise, the law of South Dakota would become a part of the contract of a South Dakota benefit society, and its provisions as to when suit might be brought would be required to be recognized in other states. See M. W. A. v. Myers, 99 O. St. 87,124 NE. 48.

It is recognized that there are limitations on the extent to which a state may be required to enforce the conflicting statutes and records of a foreign state under the full faith and credit clause of the Federal Constitution, Alaska Packers Ass'n. v. Industrial Accident Commission, 294 U. S. 532. And it is for the Supreme Court of the United States to say for itself how far the full faith and credit clause compels the qualifications or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state. Pacific Employers Insurance Company v. Industrial Accident Commission 306 U. S. 493, 502. And that, ordinarily, the state of the forum will not be required to enforce a foreign statute which is obnoxious to the public policy of the forum, Id, 306 U. S. 504.

In Klaxon Co. v. Stentor Mfg. 313 U. S. 487, this Court held that although Delaware might be compelled to enforce a New York contract, yet the incidental question of damages was a matter of local concern, on which the Delaware Court had the right to pass.

Griffin v. McCouch, 313 U. S. 498, was a diversity of citizenship case arising in Texas. Under Erie R. Co. v. Tompkins, 304 U. S. 64, the Federal Court must follow Texas law. It involved a New York contract of insurance upon the life of a Texas citizen assigned to persons alleged to have no insurable interest. Texas had a law which required the beneficiary to have an insurable interest; New York had no such requirement. This Court held that Texas had such an interest in protecting its citizens from the assumed dangers of insurance on their lives held by strangers, that it must be determined by Texas law whether the contract should be enforced.

In Pink v. A.A.A. Highway Express, 314 U. S. 201 the rights of membership in a New York corporation were involved. This Court held that the Court of Georgia had the right to determine whether a Georgia citizen had in fact become a member of this corporation, or what obligation he had assumed toward such corporation. The Court said: "Where a resident of one state has by stipulation or stock ownership become a member of a corporation or association of another, the state of his residence may have no such domestic interest in preventing him from fulfilling the obligations of membership as would admit of a restricted appli-

cation of the full faith and credit clause. But it does have a legitimate interest in determining whether its residents have assented to membership obligations sought to be imposed on them by extrastate law to which they are not otherwise subject".

The cases which have been above referred to establish the doctrine that when there is a conflict between the law of the state of the forum and the law of another state, and it is sought to have such law of the latter enforced in the state of the forum, this Court will weigh the conflicting governmental interest of the states of the two jurisdictions, and determine for itself whether the law of the forum shall prevail, or the law of the other state shall be enforced.

VI.

THE GOVERNMENTAL INTERESTS OF OHIO IN THIS CASE FAR OUTWEIGH THE INTERESTS OF SOUTH DAKOTA.

In this case a citizen of the state of South Dakota voluntarily became a member of the petitioning order, a fraternal benefit society. He thereby entered into a relationship to which it is necessary that a single law apply, according to the holdings of this Court. The law that must apply is the law of the domicile of the society. That is the important consideration in determining what law should apply. In addition, this suit was brought by an Ohio citizen, who left his own jurisdiction where it was clear that he could not recover, and came to South Dakota for his forum to avoid the effect of the Ohio law. This was an Ohio contract made and consummated in Ohio. Generally rights

acquired by contract outside a state are enforced within a state against its citizens. Performance of the contract on the part of the petitioning Order was to be made by the payment of money only, which gave rise only to a transitory cause of action. See Hartford Accident Indemnity Co., et al, v. Delta Pine Land Co. 292 U. S. 143. This case is also authority for the proposition that mere citizenship in the state of the forum does not justify such state to enlarge the obligations of a contract lawfully made in another state to accord with all its own statutory policies. The fact that the insured became an insured member of the petitioning order and entered into the contract for insurance sued on, is all admitted. There were no local matters for the South Dakota Court to inquire into, as was involved in the case of Pink v. A.A.A. Highway Exp., supra. The only question was what rights and obligations were acquired or incurred by this Ohio contract.

This is not merely a matter of requiring South Dakota to recognize a contract made by one of its citizens in Ohio with an Ohio corporation. It involves more than a contract. It involves those rights which grow out of the complex and abiding relation which membership in a fraternal beneficiary society creates, and the necessity that those rights be administered under a single law. M. W. of America v. Mixer, supra.

An appraisal of the respective interests of South Dakota and Ohio clearly shows, as we believe, that the interests of Ohio far outweigh and overbalance the governmental interests of South

Dakota. The result is that the full faith and credit clause of the c nstitution should be applied, and the South Dakota court required to recognize and enforce the Ohio law as to the period within which a suit might be brought on the certificate of insurance of the petitioning Order.

VII.

IN OHIO THE ESTABLISHED RULE IS THAT WHERE ONE OF HIS OWN VOLITION FOLLOWS AN INTENDED COURSE OF CONDUCT CULMINATING IN INJURY OR DEATH, THE RESULT MAY BE ACCIDENTAL, BUT NOT THE MEANS; AN EFFECT WHICH ENSUES AS A CONSEQUENCE OF A PURPOSED ACT IS NOT PRODUCED BY ACCIDENTAL MEANS.

There are four cases in Ohio dealing with the subject of accidental means. In chronological order they are—

New Amsterdam Casualty Co. v. Johnson, 91 O.S. 155, 110 N. E. 475 (1914)

Burns v. Employers Liability Assurance Corp. 134 O. S. 222, 16 N. E.2d 316 (1938)

Mitchell v. New York Life Ins. Co., 136 O. S. 551, 553, 27 N. E.2d, 243 (1940)

Hassey v. Metropolitan Life Ins. Co., 140 O. S. 266, 43 N. E.2d, 229. (1942)

The above headline is quoted directly from the Hassey case, supra, which is the latest of the Ohio decisions.

The Ohio decisions, cited above, clearly establish a rule of construction on the language of this insurance certificate, which is that indemnity is granted only when there is bodily injury which is "effected through external, violent and accidental

means". In the latest of these cases, Hassey v. Metropolitan Life Ins. Co., 140 Ohio State, supra the rule is definitely stated in the terms of the above headlines. That Court approved an instruction of the trial court that the accident must be in the act that precedes the injury and not merely the unexpected result.

In the earlier Ohio case of Mitchell v. New York Life Ins. Co., 136 Ohio State 551, supra, the opinion quotes with approval from the opinion in Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491, as follows:

> "But it is not enough to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man—that the result of the exposure 'was something unforeseen, unsuspected, extraordinary, an unlooked for mishap, and so an accident,' (citing cases)—for here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental."

VIII.

THE SOUTH DAKOTA SUPREME COURT IN THIS CASE ARBITRARILY AND WITHOUT REASONABLE BASIS ASSUMED THAT THE OHIO COURT WOULD HOLD THAT THE DEATH OF FORD SHANE WAS PRODUCED BY EXTERNAL ACCIDENTAL MEANS, AND ERRONEOUSLY GAVE JUDGMENT AGAINST PETITIONER ON THIS ASSUMPTION. (R 61)

See opinion this case, 18 N. W.2d 759 (8)
See cases cited under No. VII above.

The four Ohio cases, which we cited under paragraph VII above, and which we contended established the rule in Ohio as to what constituted injury by accidental means, were reviewed by the South Dakota court in its opinion (R 59, 60). We analyze the holdings of these cases further:

In the Johnson case, supra, the insured suffered acute dilation of the heart from taking a cold plunge following a horseback ride. The respective contentions made by the parties before the Court was:

> "First. On the part of the insured: That if the event preceding the injury, and which proximately caused the injury, produced injurious results not common or usual or to be reasonably anticipated as a result thereof, the unlooked-for result makes the initial event an accident and the injury one sustained by accidental means—in short, the result determines the cause".
>
> "Second. On the part of the company. That the event preceding the injury must be in the nature of an accident; that an unexpected or

> unusual result of an act not an accident in itself does not render it (the act) an accident or the consequent injury one happening from accidental means. In other words, the cause determines the result".

The court sustained the contention of the company.

We have already quoted from the Mitchell case, supra. The view that the Ohio court is committed to the rule that the accident must be in the act that precedes the injury, is emphasized by the dissenting opinion of Judge Hart in this case who argued in his opinion (Page 59) that it was sufficient if there was an unexpected and unusual result.

We have already quoted from the opinion in the Hassey case. Again Judge Hart dissented, saying (Page 278) "I am unable to agree with the majority opinion of this court wherein it says:

> 'Where one of his own volition follows an intended course of conduct, culminating in injury or death, the result may be accidental but not the means' ".

The opinion of the Court in the case at bar (R 59) after reviewing the above four decisions of the Ohio Supreme Court on this question, concluded that the rule as stated in U. S. Mutual Accident Ass'n. v. Barry, 131 U. S. 100 would be followed by the Ohio Court. Just why the court picked out the Barry case rather than that of Phoenix Mut. Life Ins. Co. v. Landress 291 U. S. 491 we cannot understand. The opinion earlier had quoted from

the latter case, (R 59), to which the Ohio cases refer.

The South Dakota opinion goes on to say that there is no case in Ohio involving death by a drug administered to cause anaesthesia, (R 60); and because in a number of anaesthesia death cases in other jurisdictions where the administration of the drug unexpectedly caused death, such death was held to be produced by accidental means; and, because these decisions are based on the rule established in the Barry case, and since Ohio Appellate courts follow that rule, it would be assumed that the Ohio court would follow these cases. The cases from other jurisdictions so holding were cited by the court to be: Mutual Life Ins. Co. v. Dodge, 11 F.2d 486, 59 A.L.R. 1290; Taylor v. New York Life Ins. Co., 176 Minn. 171, 222 N. W. 912; Wheeler v. Title Guaranty of America, 265 Mich. 296, 251 N. W. 408; Whatcott v. Continental Casualty Co., 85 Utah 406, 39 P. 2d 733; Denton v. Travelers Ins. Co., 25 F Supp. 556; Vollrath v. Central Life Ins. Co. of Illinois, 243 Ill. Appl. 181; Schleicher V. General Accident, Fire & Life Assur. Corp., 240 Ill. App. 247.

In the Dodge case the opinion does refer to the Barry case, but it is clear that the court found the unexpected result to constitute the accidental means.

In the Denton case, the Dodge case is cited as authority for the decision but the Barry case is not mentioned therein. The contract was a New York contract, and the court followed New York decisions.

In the Taylor case, supra, the Barry case is cited in a group of cases as authority for the rule that "an effect which does not ordinarily follow, and can not be reasonably anticipated from the use of these means . . . is produced by accidental means".

In the Wheeler case, supra, the Taylor and Dodge cases are followed and cited, but the Barry case is not mentioned.

In the Whatcott case, the Barry case is not cited. The hazard insured against was from "an accidental event", not from injury by external accidental means.

In the Schleicher case, supra, the same definition of accidental means is adopted as in the Taylor case, and the Barry case is not used as a precedent.

The Vollrath case cites the Barry case, and what we consider the pertinent part of this definition is quoted, but there is no application of the definition so quoted to the facts therein presented; and the statement that "the view of the courts of this State follow the rule laid down in U. S. Mutual v. Barry" is entirely unsupported by any cases or comments.

We submit that not only does an analysis of these cases fail to show that they are all based on the rule established in the Barry case, but that in those cases citing the Barry case the court has misconstrued the rule laid down by the Supreme Court of the United States, as interpreted in the Landress case in 291 U. S. 491.

In the Barry case, it is to be noted that the controlling factor in the court's mind was that in jump-

ing from the platform something unexpected or unintended happened in the way that Dr. Barry jumped. As set forth in the opinion, the question was, whether there was anything accidental, unforeseen, involuntary or unexpected in the act of jumping, from the time the deceased left the platform until he alighted on the ground. The rule laid down in the Barry case is that "if in the act which precedes the injury, something unforeseen or unexpected occurs which produces the injury, then the injury "results through accidental means". This interpretation of the Barry case and its salient decision is forceably set forth in the Shane case, supra, which quotes with approval Judge Denison's opinion in Pope v. Prudential Ins. Co., 29 F 2d, 185, wherein he says: "The evidence recited, what the court has said in its charge to the jury, and the comments of the Supreme Court, all indicate that the approved theory of recovery was that there had been some slip or mishap attending Barry's act in jumping to the ground, whereby his intended act was, as to the manner of its execution, transformed into an unintended one."

Cases from other jurisdictions on anaesthesia deaths holding that there is an absence of accidental means are Otey v. John Hancock Mutual Life, 199 S. E. 596 (W. Va.); Hesse v. Travelers Ins. Co., 229 Pa. 125, 149 Atl. 96; United Commercial Travelers of America v. Shane, 64 F., 2d, 55. Barnstead v. Com. Trav. Mut. Acc. Ass'n. 198 N. Y. Supp. 416; Westmoreland v. Preferred Acc. Ins. Co., 75 Fed. 244.

In the Otey case, supra, the Barry case is cited

and the lower court's instruction to the jury is quoted to show that many courts have misconstrued the Barry case and used it as authority for the courts conclusion that you look to the result rather than to the means. Thus, the Supreme Court of West Virginia says that "the question was whether anything accidental, unforeseen, involuntary or unexpected occurred in the act of jumping, from the time he left the platform until he alighted on the ground . . ." The West Virginia Court likewise comments on the Vollrath, Taylor, Wheeler and Dodge cases; and as to the Dodge case says, on page 598 of the opinion, "this holding is made principally upon authority of the Barry case, supra," and on page 599 the courts says in commenting upon the Landress case, "the Landress case is chiefly important because it seems to disagree with the theory upon which the holding in the Dodge case is based." In the U. C. T. v. Shane 64 Fed. 2d, 59 the United States Circuit Court of Appeals of the 8th Circuit passed upon the record that is here involved, and held that the death of Shane was not the result of accidental means.

Do the Ohio cases, supra, rely upon the Barry case, and, if so, has the Supreme Court of Ohio adopted the interpretation of the Barry case as set forth in those cases exemplified by the Dodge cases?

The Johnson case, which is the leading case and was a case of first impression in Ohio, does not cited or rely upon the Barry case.

In the Burns case, in defining the term "accident" the Barry case is cited. It is to be noted that the court is defining the term "accident" and not the term "accidental means."

In the Mitchell case the majority opinion does not cite the Barry case. The dissenting opinion cites the Barry case as one of the authorities for the conclusion therein reached by the minority of the court.

The same situation is found in the Hassey case, in that the same Judge who wrote the dissenting opinion in the Mitchell case again uses the Barry case in his dissenting opinion therein.

The conclusion is inevitable (1) that the Supreme Court of Ohio does not necessarily rely upon the Barry case in arriving at its decisions in the four cases above quoted, and (2) any reliance thereon is predicated upon a correct interpretation of the definition of accidental means, in that it must be ascertained whether anything "unexpected, unforeseen or unusual occurred in the act preceding the injury". It follows that the South Dakota court erred in assuming that the Ohio court would hold that the death of Shane was the result of accidental means. There is no basis for this assumption.

To summarize, the South Dakota Court acknowledged that the law of Ohio should be followed as to what constituted injury by accidental means (R 58); correctly found that the Ohio decisions followed the rule as set forth in the Landress case, supra, which restated the rule of the Barry case (R 59); failed to note that there had been two interpretations of the rule of the Barry case, but that the right interpretation had been declared by the Landress case; wrongly assumed that the Ohio courts would follow those cases from outside jurisdictions, which wrongly interpreted the rule in the

Barry case; wrongly assumed that the Ohio courts would abandon its established rule on injury by accidental means in an anaesthetic case. We think it is clear that the South Dakota court did not arrive at the correct conclusion as to what the Ohio Courts would hold on the record in this case. We ask this Court to so find and rule.

IX.

THE SOUTH DAKOTA COURT ARBITRARILY AND WITHOUT REASONABLE BASIS ASSUMED THAT THE OHIO COURT WOULD HOLD THAT THERE WAS A PRESUMPTION THAT THE DEATH OF FORD SHANE WAS BY EXTERNAL, ACCIDENTAL MEANS, IN THE ABSENCE OF EXPRESS PROOF TO THE CONTRARY; BASING SUCH ASSUMPTION ON THE HASSEY CASE IN OHIO, SUPRA, WHICH INVOLVED AN UNEXPLAINED DEATH. (R-61)

See opinion this case, 18 N. W.2d 759 (9)

In the Hassey case, 140 O. St. 266, 43 N. E.2d 229, the insured was found dead in a building wrecked by an explosion. The circumstances of the death were entirely unknown and unexplained. In such a case, says the Hassey opinion, there is a presumption that the death was accidental. In support of that statement, the opinion cites: 29 Am. Jur. p. 1082 §1443; Graham v. N. Y. Life Ins. Co., 182 Wash. 612 ,619, 47 Pa.2d 1029, 1032; Mitchell v. Industrial Comm. 135 Ohio State 110, 19 N. E.2d 769. The latter two cases are suspected suicide cases, where the deaths were entirely unexplained. The reference to 29 Am. Jur., supra, contains the following:

> "In this respect, the authorities support the general rule that in an action on a policy insur-

ing against death caused solely by external, violent and accidental means, the burden of proof is on the plaintiff to show from all the evidence that the death of the insured was the result of accidental as well as external and violent means, but that where death by unexplained, violent and external means is established, a presumption is thereby created or prima facie proof is thereby made of the fact that the injuries were accidental, without direct and positive testimony on that point, since the law will not presume that the injuries were inflicted intentionally by the deceased or by some other person."

There was nothing unexplained nor mysterious about the circumstances of this death. All of the circumstances were detailed in the evidence. The opinion states that there was no evidence to overcome the presumption of accident. This is in error. The evidence did disclose just what caused the death of Ford Shane. Dr. Janis, the attending physician, testified that the idiosyncracy was the cause of the death. This was an internal condition of the body of Ford Shane. Dr. Doyle testified to the same effect. The trial court so found. The problem of the South Dakota Court was to ascertain what the Ohio Courts would hold in this situation. The only reasonable assumption is that the Ohio Court would apply the rule of presumption that the injury was accidental only in the class of cases noted in the Hassey case.

X.

AN ERRONEOUS ASCERTAINMENT OF WHAT THE APPLICABLE LAW IN OHIO IS, AS EFFECTUALLY DENIES TO PETITIONER THE BENEFIT OF THE OHIO LAW AS IF THE SOUTH DAKOTA COURT HAD REFUSED TO APPLY THE OHIO LAW.

In order to correct the error of the State Court, this Court must have power to make its own determination of what the Ohio law is. Otherwise, it would be within the power of the state court practically to prevent a review here. Truax v. Corrigan, 257 U. S. 312. See also Norris v. Alabama, 294 U. S. 587, 590.

XI.

CONCLUSION AND PRAYER FOR RELIEF

We have reviewed in this brief the decision of the South Dakota Court, which held that the six months limitation in the contract of insurance was not required to be enforced, and contended that the full faith and credit clause does require that it be enforced in South Dakota. We have reviewed the decision of said Court as to what the Ohio courts would hold on the question of whether the death of Shane was from an injury by accidental means, and contended that under the rule established in Ohio its courts would hold that this was not an injury by accidental means. The sustaining of either one of our contentions will require that the decision of the Supreme Court of South Dakota be reversed, and judgment ordered for the Petitioner.

Petitioner asks that both of its contentions be

sustained, that the judgment of the State Court be reversed and judgment ordered for petitioner.

Respectfully submitted,

Byron S. Payne, Pierre, S. D.,

E. W. Dillon, Columbus, Ohio,

Attorneys for Petitioner,

Samuel Herrick, Washington, D. C.,
of counsel for Petitioner.

No. 556

In the Supreme Court of the United States

October Term, 1945

The Order of United Commercial Travelers of America, a corporation, Petitioner,

v.

Edward C. Wolfe

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

SUPPLEMENTAL BRIEF OF PETITIONER

Byron S. Payne, Pierre, S. D.,

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ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

SUPPLEMENTAL BRIEF OF PETITIONER

The purpose of this supplemental brief is to try to show somewhat the extent to which the doctrine of the case of Supreme Council of Royal Arcanum v. Green, 237 U.S.531, as followed and approved in M. W. A. v. Mixer, 267 U. S. 544 and Sovereign Camp v. Bolin, 305 U. S. 66, has been accepted and relied upon; and to review briefly the case of Home Insurance Co. v. Dick, 281 U. S. 397.

THE GREEN, MIXER AND BOLIN CASES.

We wish to point out that under the issues raised in this case, a decision of affirmance necessarily requires the reversal of the decisions of this Court in Royal Arcanum v. Green, supra, M. W. A.

v. Mixer, supra, and Sovereign Camp v. Bolin, supra. The principle and doctrine of these cases is that membership in a fraternal beneficiary association creates "a complex and abiding relation" which requires that its charter and powers and acts be construed according to the law of the state of the domicil of the association, and that the refusal of another state to so construe the charter and acts of such association denies full faith and credit to the public acts and records of the state of the domicil of the association, in violation of the federal Constitution. These cases have never been reversed or modified by this Court.

The doctrine of these cases has been followed generally by federal and state courts which have had the matter brought before it since the decision in Royal Arcanum v. Green, supra. We list a number of such decisions.

Bradford Electric Co. v. Clapper, 286 U. S. 145
Clark v. Security Benefit Assoc., 343 Mo. 263
Ferris v. American Insurance Union, 245 Mich. 548
Green v. Royal Neighbors, 146 Kan. 571
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Young v. Order of U. C. T., 142 Neb. 566, 7 N. W. (2d) 81

In the syllabus of the Green case, supra, it is stated:

"1. When the trial court refuses to hold that the rights of the parties were to be determined by the law of another state in which a decree had been rendered * * *, and to apply such law, it refuses to give effect to such decree and a question arises under the full faith and credit clause of the United States Constitution.

"2. The rights of members of a corporation of a fraternal benefit character have their source in the Constitution and By-Laws of the corporation * * * and such Constitution and By-Laws must necessarily be construed by the law of the state of its incorporation.

"4. Failure of the court to give effect to and apply the law of the state of incorporation * * * amounts to denying full faith and credit of such judgment."

In the Mixer case, the unanimous opinion written by the late Justice Holmes approved the Green case and laid down the following rule:

> "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and, as marriage looks to the domicile, membership looks to and must be governed by the law of the state granting the incorporation. We need not consider what other states may refuse to do, but we deem it established that **they cannot attach to membership rights against the company that are refused by the law of the domicile.**" (Emphasis ours.)

In the Bolin case, supra, the court, in the first paragraph of the syllabus, reaffirms the Green and Mixer decisions as follows:

> "* * * Another state wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile."

On page 78, the court said:

> "The court below was not at liberty to disregard the fundamental law of the petitioner and turn a membership benefit certificate into an old line policy to be construed and enforced according to the law of the forum. The decision that the principle of ultra vires contracts was to be applied as if the petitioner was a Missouri old line life insurance company was erroneous in the light of the decisions of this court which have uniformly held that the rights of members of such associations are governed by the definition of the society's powers by the court of its domicile." Citing **Hartford v. Ibs,** 237 U. S. 661; **Hartford** v. **Barber,** 245 U. S. 146; Green, supra, and Mixer, supra.

In the Clapper case, supra, the Mixer decision is applied and cited as authority for the statement on page 154 of the opinion, that:

"A Federal Court sitting in New Hampshire is bound equally with the courts of the state to observe the command of the full faith and credit clause, where applicable."

In North American Union v. Johnson, supra, the Arkansas Supreme Court cited and quoted from the Green case on page 387, and on page 390 of the opinion, says:

"Let it be remembered that, whatever the law may be in other jurisdictions, the law of Illinois, as we have seen, must govern in determining the issue as to liability of the appellant * * *"

The Iowa Supreme court, in the Hamlin case, supra, on page 1327 says:

"It would be intolerable that the rights and obligations of stockholders of a corporation shall vary according to or depend upon the lex fori or the lex domicili. It is well settled, therefore, that the law of the state creating the corporation controls in the determination of their rights and obligations, though not necessarily the remedy. (Citing Mixer and Green cases.)"

In the case of Green v. Royal Neighbors, supra, the Kansas Supreme Court, after citing the Green case, on page 574 of its opinion says, on page 576:

"In deference to this decision (Mixer) the Supreme Court of Oklahoma, in **W. O. W.** v. **Smith,** 176 Okla. 545, 56 Pac. (2) 408, abandoned its own prior ruling * * *"

And the Supreme Court of Michigan, in the Ferris case, supra, after stating that the rule is laid down in the Green and Mixer cases, explains the same as follows:

> "This may be considered a hard rule, but we must remember that the society is a non-profit one and that the members sustain a mutual relation, make their own laws, and all are bound thereby **if valid under the laws of the domicile of the society.** Any other holding would destroy mutuality, favor some beneficiaries over others and abolish uniform rights and remedies." (Emphasis ours.)

The Minnesota Supreme Court, in the Olsen case, supra, has this to say on page 10 of its opinion:

> "The courts of one state might hold changes made by the corporation valid, while courts of other states declare them void. No association of the sort here involved, having members in different states, could well survive a condition where the courts of a state other than its domicile step in and determine for the future what the assessments and benefits of its members in such state shall be. * * * Especially is this so since the decision (in the Green case)."

And in the Palmer case, the same Supreme Court, on page 209, states:

> "In view of such decisions as **Modern Woodmen of America** v. **Mixer,** 267 U. S. 544 and **Royal Arcanum** v. **Green,** 237 U. S. 531, the binding effect of the change in the Constitution of defendant must be recognized and our own decisions, prior to **Mooney** v. **Brotherhood of Railway Trainmen,** 162 Minn. 127, modified."

In Missouri, the Supreme Court of that State, in the Robertson case, after citing the Mixer and Green cases, has this to say on page 298:

> "In view of the rulings by the Supreme Court of the United States, we are constrained to rule that the endowment provision in plain-

tiff's certificate was rendered unenforceable by the Supreme Court of Kansas in the Dey case and that under Section 1, Article IV, of the Constitution of the United States, we are bound to give full faith and credit to this Kansas decision."

This same court, in the Clark case, supra, reaffirmed the doctrine of the Green and Mixer cases, on page 271, as follows:

"Because said endowment provision was held unenforceable under the decisions of the Supreme Court of Kansas in the Dey case, * * * this court is bound to give full faith and credit under Section 1, Article IV, of the Constitution of the United States."

And in the Reese case, the Missouri court, after pointing out the Green and Mixer cases, has this to say on page 38:

"It is pointed out (W. O. W. v. Bolin, 59 Sup. Ct. 35) that the rights of members of such an association or society have their source in the Constitution and By-Laws and can only be determined by resort thereto and that its Constitution and By-Laws must necessarily be construed by the laws of the state of incorporation, that is, that such rights must of necessity be determined by a single law and that the judgment of the Supreme Court of the state wherein such association is incorporated, construing the validity and effect of its Constitution and By-Laws and defining the rights of members thereunder must be given effect by the courts of another state under the full faith and credit clause of the Federal Constitution."

The Court of Appeals of New York, in the McClement case, supra, approved the decision in

the Green case and on page 41 says:

> "It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

The Supreme Court of Ohio, which is the state of the domicile in the case at bar, approves the Green case in the case of Modern Woodmen v. Meyers, supra, and on page 93 says:

> "The reason for this principle is at once apparent. It permits a single and unified obligation due from such association to its various members, ascertainable according to the law of the state where the contract is made and is to be consummated and where the corporation is organized and the contracting parties reside, so that there may be a unified liability only and not diverse liabilities arising from divergent construction of contracts by courts of different jurisdiction. The possibility arising from the fact that courts of various states may have divergent rules for distribution of funds of this character has led the courts of last resorts, as stated by Chief Justice White in Royal Arcanum v. Green, supra, 'to recognize the charter of the corporation and the laws of the state under which it was granted as the test and measure to be applied.'"

The Supreme Court of Texas, in the Henry case, supra, says on page 336:

> "Appellee also relies on such cases as Royal Arcanum v. Green, Modern Woodmen v. Mixer, Supreme Lodge v. Mims, 241 U. S. 574, 60 L. Ed. 1179, in support of the contention * * * that the courts of the forum must give full faith and credit * * * to the public acts, records and judicial proceedings of the domiciliary

state" . . . "If the domiciliary court holds that a certain act is or is not beyond the charter powers of the society, **or that a certain By-Law is or is not reasonable,** such holding must be given full faith and credit by a court of another state." (Emphasis ours.)

While approving the principle of the Mixer case, the Texas court did not find it necessary to apply it in that case because it found that there was no proof in the record as to the law of the domicil of the association, and it would be assumed that the law was the same as in Texas.

In M. W. A. v. Crudup, supra, the Supreme Court of Oklahoma said:

> "This Court in 1924 held that the rule as to the presumption of death after seven years' absence could not be abrogated by contract, and that said by-laws were contrary to public policy and void. In 1925 the Supreme Court of the United States in Modern Woodmen of America v. Mixer, 267 U. S. 544, reversed a decision of the Supreme Court of Nebraska on this point in a case wherein these identical contentions were made by plaintiff in error. . . Therefore, under the Mixer opinion, the decision of the Supreme Court of Illinois in Steen v. M. W. A., 296 Ill, 104 was decisive of the question."

See also, Sov. Camp, W. O. W. v. Smith, 176 Okl. 545, 56 Pac. (2d) 408.

Mooney v. Brotherhood of Ry. Trainmen, supra, was first decided before the decision in M. W. A. v. Mixer, 267 U. S. 544. (See 162 Minn. 127, 202 N. W. 341) After the Mixer case was announced, the Supreme Court of Minnesota changed its de-

cision to conform thereto. The Court in its opinion, after quoting from the Mixer case, has this to say:

> "True, the particular by-law now involved has not been confirmed by a favorable decision concerning it. It has not been the subject of a test case as that discussed in Supreme Council v. Green, 237 U. S. 531. But for that reason alone, not to follow the rule of the Supreme Court would be a sacrifice of principle to technicality, and the principle of the Illinois decision (cited in the original opinion), aided by that of Supreme Council v. Green and Modern Woodmen v. Mixer, leaves us no option but to make it controlling here.
>
> "That is so because defendant is governed by an Illinois Charter, which with the 'laws of the state under which it was granted' is 'the test and measure to be applied'. As was said further by Mr. Chief Justice White in the Green case, the thing to which full faith and credit must be given is the 'charter of the corporation' granted by its home state. Reference must be had 'to the laws of that state to determine the powers of the corporation and the rights and duties of its members'. In that connection it will not do to ignore the 'signficance' of the charter and the applicable local law as declared by the supreme judicial tribunal of the domiciliary state.
>
> "Here it is clear without any decision of the Illinois court on this particular by-law, that it would be upheld there. So we must abide by that view and cheerfully do so."

Since the decision in the Green case was announced in 1915, and expecially since the decision in the Mixer case in 1925, federal and state courts have made the doctrine therein announced the

rule for disposing of claims and interests affecting fraternal benefit associations. This includes not only reported cases in appellate courts, but the great volume of cases handled in trial courts. Financial claims and interests of an incalculable amount have been disposed of in reliance upon the law of these cases. In addition, to reverse these cases will destroy the mutuality and equal treatment required to be afforded members of a fraternal benefit society, and open the door to divergent treatment of rights of membership by the various states. Under the doctrine of the Green and Mixer cases as it has stood for so long, any one state may have the powers and rights of fraternal benefit associations which are created under its laws, and rights of membership therein, determined by its own laws, wherever it may operate, and is only required to accord to a fraternal benefit society created by another state the right to have its powers and rights determined by the law of its domicil. From the nature of its organization and the relation created between its members, a fraternal benefit society is in a class by itself, and requires special rules to preserve the integrity of the organization.

HOME INSURANCE v. DICK, 281 U. S. 397

In the above case, the issue whether the provision in the contract of a foreign insurance company which limited the time when suit might be brought was the equivalent to a foreign statute of limitations was expressly submitted to the court. The lower courts had so held, and that only questions of local law and conflict of laws were involved

(id 405); that the question of when suit might be brought related to the remedy only, and was governed by the **lex fori.**

The South Dakota court took the same position in this case, at page 758 of 18 N. W. Reporter 2d, speaking to the limitation clause in the insurance certificate, the opinion states:

> "There is a further distinction. Those cases (the Green, Mixer and Bolin cases) related to substantive rights and obligations of the society and its members under the insurance certificate. Here the question is in no way related to the validity of the insurance contract. It has to do with the remedy only, and in such matters the courts of the forum are free to apply the rules of the forum, notwithstanding the 'full faith and credit' and 'due process' clauses of the United States Constitution.

That holding was in direct conflict with the holding in the Dick case. The South Dakota court did not mention the Dick case in connection with its holding on this issue, although it had previously mentioned the case in connection with a discussion of the due process clause of the federal constitution.

The decision on the effect of the contract limitation in the Dick case, was definite and explicit. The opinion by Mr. Justice Brandeis states:

> "The contention (that the **lex fori** governed) is unsound. There is no dispute as to the meaning of the provision in the policy. It is that the insurer shall not be liable unless suit is brought within one year of the loss. Whether the provision be interpreted as making the commence-

ment of a suit within the year a condition precedent to the existence of a cause of action, or as making failure to sue within the year a breach of a condition subsequent which extinguishes the cause of action, is not of legal significance here. Nor are we concerned with the question whether the provision is properly described as relating to remedy or to substance. However characterized, it is an express term in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined. If effect is given to the clause, Dick cannot recover from the Mexican corporation and the garnishees cannot be compelled to pay. If, on the other hand, the statute is applied to the contract, it admittedly abrogates a contractual right and imposes liability, although the parties have agreed that there should be none.

"The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts. As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for. Therefore, the objection that, as applied to contracts made and to be performed outside of Texas, the statute violates the Federal Constiution, raises federal questions of substance; and the existence of the federal claim is not disproved by saying that the statute, or the one year provision in the policy, relates to the remedy and not to the substance."

The Court found support for its decision in previous decisions of the Court (cited in footnote) in 7 Wall 386, and 13 Wall. 151, 161, and in the case of Suggs v. Travelers Ins. Co. 71 Tex. 579. In the latter case, the court had before it a contractual limitation, and had this to say regarding same:

> "It is said to differ from statutory limitation in this that it does not merely deny the remedy but forfeits liability when suit is not brought within the stipulated time."

Pertinent to this question is the statement of the court in **Pritchard** v. **Norton,** 106 U. S. 124, cited on page 2 of Appellee's brief. The first paragraph of the syllabus in that case is as follows:

> "Question of validity of a bond, as dependent upon the sufficiency of its consideration, is not a matter of procedure and remedy, to be governed by the lex fori, but belongs to the substance of the contract and must be determined by the law of the seat of the obligation."

On page 29, the court said:

> "The principle is that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum * * *; but whatever goes to the substance of the obligation and affects the rights of the parties, **as growing out of the contract itself, or inhering in it or attaching to it,** is governed by the law of the contract." (Emphasis ours.)

And in **Dolan** v. **Royal Neighbors of America,** 123 Mo. App. 147, 100 S. W. 498, the court had before it the issue as to whether a contractual limitation in a contract of insurance does or does not pertain to the remedy. On page 500, the court said:

"Such provisions are universally held to be qualifications annexed to the right created under the contract, and are sometimes mentioned and declared as standing on the same ground as conditions precedent (cited, May on Insurance, 4th Edition, paragraph 478). It is determined to be a provision which not only has no reference to the statute of limitations, but imposes a restriction or qualification upon the rights vouchsafed in the contract entirely independent of the limitation statutes, so that, instead of operating merely as a limitation upon the right to sue, it operates in the nature of a condition precedent to forfeit the liability when a suit is not instituted within the stipulated time."

And in the case of **Union Central Life Insurance Co., v. Barnes,** 175 Ky. 364, 194 S. W. 339, the court, in the South West citation, said on page 340:

"It is also argued * * * that the question of limitation is one of remedy * * * and this would be true if the question were one as to which statute of limitation should apply * * *. But such is not the case here, since the statutes of limitation of the various states are not involved, but only the validity of the contract itself."

The Dick case was decided in 1930, is sound in principle, and is supported by good judicial authority. It has not been reversed or modified, and we can conceive of no reason for departing from it at this time.

On the whole situation, we respectfully suggest that this Court need only follow rules of law estab-

lished by its own decisions, to sustain the contentions of the Petitioner herein, and reverse the decision of the State Court.

Respectfully submitted,

Byron S. Payne, Pierre, S. Dak,
E. W. Dillon, Columbus, Ohio,
Attorneys for Petitioner.

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No. 556 32

In the Supreme Court of the United States

October Term, 1945

The Order of United Commercial Travelers of America, a corporation, Petitioner,

vs

Edward C. Wolfe, Appellee

Appellee's Statement and Brief Objecting to and Denying Jurisdiction as Asserted by Petitioner.

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In the Supreme Court of the United States

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Edward C. Wolfe, Appellee

Statement of Appellee, Edward C. Wolfe, Objecting To and Denying Jurisdiction as Asserted by Appellant.

Appellant, as Petitioner herein, invokes the jurisdiction of this Court asserting the Supreme Court of South Dakota under Section I of Article IV of the United States Constitution failed to give effect to the law of the State of Ohio in that: (1) under the Ohio law this action was barred because not brought within six months from the dissallowance of the claim; and (2) under the Ohio law the death was not occasioned by external, violent and accidental means.

The following decisions are believed to clearly deny the jurisdiction on this appeal.

I.

(a) The South Dakota Supreme Court in the opinion, 18 N.W. (2) page 755 at pages 757, 758, (R 56, 57) characterized the question of the three months' limitation in the insurance contract as relating to the remedy and as procedural and not substantive. This characterization by the State Court must be adopted and the law governing the

question as so characterized must be applied. Furthermore, the State Supreme Court at page 757 of the opinion (R 56) held Section 10.0705 South Dakota Code of 1939 (R 54), to be a statute of limitations.

Pacific Employers Insurance Co. vs Industrial Accident Commission 306 U.S. 493
Griffin vs McCoach, 61 S.Ct. 1023
Klaxon Co. vs Stentor Electric Mfg. Co. 313 U.S. 487
Erickson vs Order of United Commercial Travelers (Kas.) 176 Pac 989
Hawkinson vs Order of United Commercial Travelers (Tex.) 20 S.W. (2) 101
Dinnie vs Order of United Commercial Travelers (N.D.) 169 N.W. 811
Sternheim vs Order of United Commercial Travelers (S.C.) 93 S.E. 8

Such constitutional provision does not compel the courts of a State to give effect to the law of another State contrary to public policy affecting within the State persons, property or events in litigation.

Pac. Employers Ins. Co. vs Industrial Acc. Co. 306 U.S. 493 at pages 501, 502, 503.
Order of United Commercial Travelers vs Meinsen (8th) 131 Fed. (2) 176
Pink vs A.A.A. Highway Express Inc. 314 U.S. 201
Pritchard vs Norton 106 U.S. 124
John Hancock Mut. Life Ins. Co. vs Yates, 299 U.S. 178
Karst vs Chicago Fraternal Life Assoc. (Mo.) 40 S.W. (2) 732 at pages 735, 736; certiorari denied at 284 U.S. 664
Bothwell vs Buckbee-Mears Co. 275 U.S. 274

II.

The Ohio Courts have not held that under the circumstances the death of Ford Shane was not produced by external violent and accidental means. The rule in Ohio is simply that the accident must be in the act that precedes the injury and not merely the unexpected result. It is upon this identical rule that the courts of divers states in similar anesthetic death cases hold, that a cause does not cease to be violent and external because the insured has an idosyncratic condition of mind or body predisposing him to injury; and also that an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, is produced by accidental means; and that if in the act which precedes the injury, something unforseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means. Hence, no occasion arose for the South Dakota Supreme Court to apply or to deny Petitioner full faith and credit to the public acts and judicial proceedings of the State of Ohio in respect to this assignment.

Silverstein vs Metropolitan Life Ins. Co. (N. Y.) 171 N.E. 914

Mutual Life Ins. Co. vs Dodge (CCA 4th) 11 Fed. (2) 486

Taylor vs N. Y. Life (Minn.) 222 N.W. 912

Wheeler vs Title Guaranty & Casualty Co. (Mich.) 251 N.W. 408

Whatcott vs. Continental Casualty Co. (Utah) 39 Pac (2) 733

Denton vs Travelers Ins. Co. (Fed. Dis. Ct. Md.) 25 Fed. Supp. 556

Vollrath vs Central Life Ins Co. (Ill.) 243 Ill. App. 181

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Mangol vs Metropolitan Ins. Co. 103 Fed. (2) 14 (7th Circuit)

CONCLUSION

In Home Ins. Co. vs Dick and Sov. Camp vs Bolin which are typical of the cases cited by Petitioner in support of its claim of jurisdicton, there was no occurence in the state of the forum and the cases do not relate to persons and events within the state of the forum, and consequently no question of conflict of laws is involved. In Modern Woodmen of America vs Mixer the insurance certificate was issued in Illinois, delivered in South Dakota and sued upon in Nebraska. The question whether the decisions of Illinois were binding also upon the Courts of South Dakota, where the contract of insurance was finally consumated, was not involved.

In all the cases cited by petitioner substantive provisions of the contract were involved.

Respectfully submited,

HUBBARD F. FELLOWS,
Attorney for Appellee
Rapid City, South Dakota

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FEB 1 1946

No. 556

In the Supreme Court of the United States

October Term, 1945

The Order of United Commercial Travelers of America, a corporation, Petitioner,

vs

Edward C. Wolfe, Appellee

BRIEF OF APPELLEE

HUBBARD F. FELLOWS,
Attorney for Appellee
Rapid City, South Dakota

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The six months' limitation in the contract is not a substantive provision; the provision is void against public policy of South Dakota; the full faith and credit provisions of the Constitution have no application under the facts involved (with argument and authorities) 1 to 4 inc.

II.

The rule in Ohio defining accidental means is no different from the rule announced by the South Dakota Supreme Court in this case; both the Ohio and the South Dakota rules are based on the same definition of accidental means; in the act which preceded the death of Shane something unforseen, unexpected and unusual occurred which produced the death; the effect was not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and could not be reasonably anticipated from the use of those means. (With argument and authorities) 4 to 8 inc.

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In the Supreme Court of the United States

October Term, 1945

No.————.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, a corporation, Petitioner

vs

EDWARD C. WOLFE, Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF OF APPELLEE

I.

THE SIX MONTHS LIMITATION IN THE CONTRACT IS NOT A SUBSTANTIVE PROVISION; THE PROVISION IS VOID AGAINST PUBLIC POLICY OF SOUTH DAKOTA; THE FULL FAITH AND CREDIT PROVISIONS OF THE CONSTITUTION HAVE NO APPLICATION UNDER THE FACTS INVOLVED.

The six months' limitation of time to sue relates to the remedy, it is not a substantive provision of the contract, and the South Dakota court is hence free to apply the State statute (SDC 10.0705), notwithstanding the "full faith and credit" and "due process" clauses of the United States Constitution.

By reason of that statute and of judicial law of South Dakota, this contract provision is declared to be unenforcible and contrary to the public policy of this State.

Inasmuch as the South Dakota Supreme Court has declared the six months' limitation provision to relate

to the remedy and as procedural and not substantive, this characterization must be adopted and applied. Annotations, 134 A. L. R. at page 1470 (2nd column).

Substantive provisions are commonly defined as those which give rise to the cause of action; and remedial provisions as being those which prescribe the method of enforcing the rights. Appellee understands the rule to be that questions relating to remedy and the time when an action must be commenced are regulated and governed by the lex fori. 17 C.J.S. pages 353, 354.

An exception to the general rule that a contract valid under its governing law is valid everywhere is the rule that where the agreement is one which violates the fixed public policy of the State in which the action is brought it will not be enforced.

Union Trust Co. v Grosman, 245 U.S. 412;
Mechanics & Metals National Bank v Smith, 21 Fed. (2) 128;
Becker v Inter-State Businessmen's Ass'n of Des Moines (CCA Kan.) 265 Fed. 508.

In Order of United Commercial Travelers v Meinsen (CCA 8th) 131 Fed. (2) 176, involving the same facts, the same insurance contract, the same insurer, and with the same questions presented, the distinction between the principles governing this case and those cited by appellant are pointed out.

Such constitutional provisions do not compel the courts of a State to give effect to the law of another State contrary to public policy affecting within the State persons, property or events in litigation.

Order of United Commercial Travelers v Meinsen (8th) 131 Fed. (2) 176;
Pac. Employers Ins. Co. v Industrial Acc. Co. 306 U.S. 493 at pages 501, 502, 503;
Pink vs A.A.A. Highway Express Inc. 314 U.S. 201;
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Griffin v McCoach, 61 S. Ct. 1023;
Pritchard v Norton 106 U.S. 124;
John Hancock Mut. Life Ins. Co. v Yates, 299 U.S. 178;
Karst v Chicago Fraternal Life Assoc. (Mo.) 40 S.W. (2) 732 at pages 735, 736; certiorari denied at 284 U.S. 664;
Bothwell v Buckbee-Mears Co. 275 U.S. 274;
Sampson v Channel (CCA 1st) 110 Fed. (2) 754. Certiorari denied June 2, 1940;
Dinnie v Order of United Commercial Travelers (N.D.) 169 N.W. 811.
Annotations, 134 A.L.R. page 1468, et seq.

None of the cases upon which appellant relies presents a similar factual situation and should not control the decision of this case.

In Home Insurance Co. v Dick, 381 U.S. 397, this Court said that a State may prohibit performance within its border of contracts made validly elsewhere, if they are required to be performed in the State and their performance would violate its laws. In the Dick case there was no occurrence of any kind within the state of the forum, hence the result which was reached.

In the case at bar the insured was a citizen of South Dakota when he was insured, the contract was delivered therein, the beneficiary was a resident of the State at such time, the insured died within the State and the cause of action arose here.

In each Supreme Council Royal Arcanum v Green, 237 U.S. 531, and in Sovereign Camp WOW v Bolin, 305 U.S. 66, and in Modern Woodmen of America v Mixer, 267 U.S. 544, and in Broderick v Rosner, 294 U.S. 629 (cited by appellant) purely substantive provisions of the contract were involved and the factual situation was entirely different.

Obviously, it was within the contemplation of the insurer that payment or enforcement of the liability on the present insurance contract would take place in

South Dakota. With this in mind, the insurer should not be permitted to insert a provision in its contract which violates the public policy of South Dakota and rely upon it for a defense.

The principle adopted in Modern Woodmen of America v Mixer, supra, should not be extended beyond cases of its kind involving similar facts. Absolute uniformity in regard to the rights and obligations of members in a company of this kind can only be attained by sacrificing the right of the individual states, through their legislatures or courts, to give effect to local policy which conflicts with the statutes or decisions of the courts of the State of insurer's domicile; and utterly destroys application of lex fori to procedural and remedial matters. Such a uniform rule is not necessary in remedial or procedural matters or in the application of adjective law. In the Mixer case, the insurance certificate was issued in Illinois, delivered in South Dakota and sued upon in Nebraska. The question of whether the decisions of Illinois were binding upon the courts of South Dakota, where the contract of insurance was consummated, was not involved. The rule in the Mixer case is not sufficiently comprehensive to cover the facts in the instant case, and it was established before the decisions in Order of United Commercial Travelers v Meinsen, Pacific Employers Insurance Co. v Industrial Accident Commission, supra, and in the Klaxon, Griffin and Pink cases.

Limitation statutes are held to operate on the remedy, and they do not extinguish the right. Titus v Wells Fargo (CCA 5th) 134 Fed. (2) 223 at page 224.

II.

THE RULE IN OHIO DEFINING ACCIDENTAL MEANS IS NO DIFFERENT FROM THE RULE ANNOUNCED BY THE SOUTH DAKOTA SUPREME COURT IN THIS CASE; BOTH THE OHIO AND THE SOUTH DAKOTA RULES ARE BASED

ON THE SAME DEFINITION OF ACCIDENTAL MEANS; IN THE ACT WHICH PRECEDED THE DEATH OF SHANE SOMETHING UNFORSEEN, UNEXPECTED AND UNUSUAL OCCURRED WHICH PRODUCED THE DEATH; THE EFFECT WAS NOT THE NATURAL OR PROBABLE CONSEQUENCE OF THE MEANS WHICH PRODUCED IT, AN EFFECT WHICH DOES NOT ORDINARILY FOLLOW AND COULD NOT BE REASONABLY ANTICIPATED FROM THE USE OF THOSE MEANS.

The rule in Ohio is simply that the accident must be in the act which precedes the injury and not merely the unexpected result.

The Supreme Court of the United States in United States Mutual Accident Ass'n v Barry, 131 U.S. 100 in discussing the meaning of the term "accidental means" (cause), said:

> "If the result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, it cannot be called a result effected by accidental means. But if, in the act which precedes the injury, something unforseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

This case is cited and this definition is adopted in almost every accident insurance case opinion since. It is in substance the rule recognized in Ohio. No pronouncement of the Ohio courts is at odds with it. It is upon this identical rule that the courts in divers states in similar anesthetic death cases hold that a cause does not cease to be violent and external because the insured has an idiosyncratic condition of mind or body predisposing him to injury. Silverstein vs Metropolitan Life Ins. Co. (N.Y.) 171 N.E. 914 (opinion by Judge Cardozo).

In Western Commercial Travelers Ass'n v Smith, 85 Fed.401 at page 405 (CCA8th) (certiorari denied), Judge Sanborn laid down the following rule:

> "An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means."

The following novocaine and kindred cases are all based on such definitions which are not at variance with the Ohio rule. These cases are almost identical in fact with the case at bar:

Silverstein v Metropolitan Life Ins. Co. (N.Y.) 171 N.E. 914

Mutual Life Ins. Co. v Dodge (CCA 4th) 11 Fed. (2) 486; 59ALR1290

Taylor v N. Y. Life (Minn.) 222 N.W. 912

Wheeler v Title Guaranty & Casualty Co. (Mich.) 251 N.W. 408

Denton v Travelers Ins. Co. (Fed.Dis.Ct.Md.) 25 Fed.Supp.556

Whatcott v Continental Casualty Co. (Utah) 39 Pac.(2) 733

Vollrath v Central Life Ins. Co. (Ill.) 243 Ill.App. 181

Berkowitz v N.Y. Life Ins. Co. (N.Y.) 10 N.Y.S. (2) 106

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Adler Blum v Metropolitan Life Ins. Co. 19 N.Y.S. (2) 600

Brown v Continental Casualty Co. (La.) 108 So. 464

Murphy v Travelers Ins. Co. (Neb.) 2 N.W.. (2) 576.

The element which was unforseen, unexpected, unusual and which resulted in an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of the means was the unknown and rare idiosyncracy to the anesthetic. In Aetna Life Ins. Co. v Brand (CCA) 265 Fed. 6 (certiorari denied at 40 Sup. Ct.587) a surgeon enclosed an incision after an operation for hernia, and in so doing punctured a deep artery with his needle owing to the fact that the artery was not where it should be in normal persons. The court held the injury was effected solely through external, violent and accidental means.

No provisions of the instant insurance contract or of Ohio law render the foregoing decisions and the South Dakota Supreme Court opinion inapplicable; and the South Dakota court, therefore, did not deny petitioner full faith and credit to the public acts and judicial proceedings of the State of Ohio.

WHEREFORE, appellee urges that the decision of the Supreme Court of the State of South Dakota, at 18 N.W. (2) 755, should be affirmed.

Respectfully submitted,

HUBBARD F. FELLOWS,
Rapid City, South Dakota
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES

No. 32.—October Term, 1946.

The Order of United Commercial Travelers of America, a Corporation, Petitioner, v. Edward C. Wolfe.	On Writ of Certiorari to the Supreme Court of the State of South Dakota.

[June 9, 1947.]

Mr. Justice Burton delivered the opinion of the Court.

This is an action in a circuit court of the State of South Dakota, brought by an Ohio citizen against a fraternal benefit society incorporated in Ohio, to recover benefits claimed to have arisen under the constitution of that society as a result of the death of an insured member who had been a citizen of South Dakota throughout his membership. The case presents the question whether the full faith and credit clause of the Constitution of the United States[1] required the court of the forum, South Dakota, to give effect to a provision of the constitution of the society prohibiting the bringing of an action on such a claim more than six months after the disallowance of the claim by the Supreme Executive Committee of the society,[2]

[1] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. Const. Art. IV, § 1. See also, Act of May 26, 1790, 1 Stat. 122; Act of Mar. 27, 1804, 2 Stat. 298; Rev. Stat. §§ 905, 906, 28 U. S. C. §§ 687, 688.

[2] "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee." From § 11 of Article IV, "Insurance," of the constitution of The Order of United Commercial Travelers of America, as printed on the back of the original certificate of membership issued to decedent August 19, 1920, and as in effect at the filing of this action June 15, 1934.

when that provision was valid under the law of the state of the society's incorporation, Ohio, but when the time prescribed generally by South Dakota for commencing actions on contracts was six years [3] and when another statute of South Dakota declared that—

> "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void." [4]

We hold that, under such circumstances, South Dakota, as the state of the forum, was required, by the Constitution of the United States, to give full faith and credit to the public acts of Ohio under which the fraternal benefit society was incorporated, and that the claimant was bound by the six-month limitation upon bringing suit to recover death benefits based upon membership rights of a decedent under the constitution of the society. This has been the consistent view of this Court. [5]

The record in the present case well illustrates both the practical effect of such a limitation as that contained in the constitution of this society and the need for the application of the full faith and credit clause to membership obligations in fraternal benefit societies.

The petitioner, The Order of United Commercial Travelers of America, was incorporated in 1888, under the general corporation laws of Ohio. [6] By 1920, when the

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[3] § 2298, S. D. Rev. Code, 1919.

[4] § 897, S. D. Rev. Code, 1919.

[5] *Royal Arcanum* v. *Green*, 237 U. S. 531; *Modern Woodmen* v. *Mixer*, 267 U. S. 544; *Broderick* v. *Rosner*, 294 U. S. 629; *Sovereign Camp* v. *Bolin*, 305 U. S. 66. See also, *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, 207, 210-211.

[6] As in effect September 1, 1930, and presumably at the member's death, May 8, 1931, the articles of incorporation contained only the following provisions:

"WITNESSETH: That we, the undersigned, all of whom are citizens

decedent, Ford Shane, of Rapid City, South Dakota, became a member, this fraternal benefit society was in active operation in many states. Then, and at his death in 1931, it was regulated in detail by the General Code of Ohio. That Code included public acts of Ohio on such subjects as the following: § 9462, Fraternal benefit society defined;[1] § 9463, Lodge system; § 9464, Representative form

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of the State of Ohio, desiring to form a corporation, not for profit, under the general corporation laws of said State, do hereby certify:

"FIRST. The name of said corporation shall be THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

"SECOND. Said corporation shall be located, and its principal business transacted at Columbus, in Franklin County, Ohio.

"THIRD. The purpose for which said corporation is formed is:

"1st. To unite fraternally all Commercial Travelers, Wholesale Salesmen and such other persons of good moral character as are now or may hereafter become eligible to membership, under the provisions of the Constitution of the Order.

"2d. To give all moral and material aid in its power to its members and those dependent upon them. Also to assist the widows and orphans of deceased members.

"3d. To establish funds to indemnify its members for disability or death resulting from accidental means.

"4th. To secure just and equitable favors for Commercial Travelers and Wholesale Salesmen as a class.

"5th. To elevate the moral and social standing of its members.

"6th. Said corporation shall be a secret Order.

"7th. To establish a Widows' and Orphans' Reserve Fund."

This society is strikingly similar in form to the "fraternal beneficiary association," incorporated in Massachusetts in 1877 and described in the leading case on this subject, *Royal Arcanum* v. *Green*, 237 U. S. 531. As to that association it was said by the Supreme Court of Massachusetts that:

"The fraternal plan, with mutuality and without profit, distinguishes the work of such an association from a commercial enterprise. It is a charitable and benevolent organization, with a limitation of membership to a special class, and a limitation upon the choice of beneficiaries." *Reynolds* v. *Royal Arcanum*, 192 Mass. 150, 155, 78 N. E. 129, 131.

[1] "SEC. 9462. . . . Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for

of government, including restrictions on amendments to its constitution; § 9465, Exemption from general insurance laws of the State; § 9466, Benefits; § 9467, To whom benefits shall be paid, stating limitations on the degrees of family relationship permitted to exist between a member and those whom he may designate to receive benefits as a result of his death; § 9468, Age limits for admission to membership; § 9469, Certificate shall constitute agreement; [8] § 9469–1, Exception as to commercial travelers; [9]

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the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 5 [G. C. § 9466] hereof, is hereby declared to be a fraternal benefit society." Ohio Gen. Code, 1931.

[8] "SEC. 9469. . . . Every certificate issued by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, of, if a voluntary association, the articles of association, the constitution and laws of the society and the application for membership and medical examination, signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the society and the member, and copies of the same certified by the secretary of the society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to such charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or enacted subsequent to the issuance of the benefit certificate shall bind the members and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership." Ohio Gen. Code, 1931.

[9] "SEC. 9469–1. . . . The provisions of section ninety-four hundred and sixty-nine of the General Code, requiring the certificate to specify the maximum amount of benefit provided thereby and the conditions governing the payment thereof, shall not apply to the certificates of a fraternal beneficiary association organized under the laws of Ohio, whose membership consists of commercial travelers and which does not obligate itself to pay stipulated amounts of benefits in case of natural death." Ohio Gen. Code, 1931.

§ 9470, Investment, disbursement and application of funds; § 9481, Laws of society shall be binding on members and beneficiaries, and the society may provide, as here, that no subordinate body, officers or members may waive any of the provisions of the laws and constitution of the society.[10] These public acts have created and regulated the society and the rights and obligations of its members. They are reflected in its articles of incorporation, constitution and by-laws. They make possible uniformity of rights and obligations among all members throughout the country, provided full faith and credit are given also to the constitution and by-laws of the society insofar as they are valid under the law of the state of incorporation. If full faith and credit are not given to these provisions, the mutual rights and obligations of the members of such societies are left subject to the control of each state. They become unpredictable and almost inevitably unequal.

The principal office of this society has been continuously in Columbus, Ohio. The society has established subordinate councils in many states and, at all times involved in this case, has been licensed to do business in South Dakota as a foreign fraternal benefit society.[11] In accord-

[10] "SEC. 9481. . . . The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members." Ohio Gen. Code, 1931.

[11] S. D. L., 1919, c. 232, § 16, authorized the issuance of such a license—

"upon filing with the Commissioner a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officers; a power of attorney to the Commissioner [to accept service of process] . . . ; a statement of its business under oath of its president and secretary, or corresponding officers, in the form required by the Commissioner, duly verified by an examination made by the supervising insurance official of its home State or other State satisfactory to the Commissioner

ance with the requirements for maintaining such license in good standing, the society has kept on file, with the Commissioner of Insurance of South Dakota, a copy of the society's constitution, including § 11 of Article IV, here in controversy, limiting the time for bringing suits to recover claims for benefits based upon that Article. The state of the forum thus has been continuously in a position to revoke or refuse to renew the society's license to do business in that State if it had good reason to do so. There

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of Insurance of this State; a certificate from the proper official in its home State, province or country, that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical, or other payments by persons holding similar contracts; and upon furnishing the Commissioner such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the State, territory, district, province or country where it is organized, he shall issue a license to such society to do business in this State until the first day of the succeeding March, and such license shall, upon compliance with the provisions of this Act, be renewed annually, but in all cases to terminate on the first day of the succeeding March; provided, however, that license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign society desiring admission to this State, shall have the qualifications required of domestic societies organized under this Act, upon a valuation by any one of the standards authorized in Section 23a of this Act, and have its assets invested as required by the laws of the State, territory, district, country, or province where it is organized. For each such license or renewal the society shall pay the Commissioner Two ($2.00) Dollars. When the Commissioner refuses to license any society, or revokes its authority to do business in this State, he shall reduce his ruling, order or decision to writing and file the same in his office, and shall furnish a copy thereof, together with a statement of his reason, to the officers of the society, upon request, and the action of the Commissioner shall be reviewable by proper proceedings in any court of competent jurisdiction within the State. . . ."

See also, §§ 31.2124-31.2126, 31.2139, S. D. Code of 1939. The State of Ohio has similar provisions in its Code. § 9477, Ohio Gen. Code, 1931.

is no evidence that South Dakota has attempted or suggested such action. The favorable, rather than hostile, attitude of South Dakota towards such societies is evidenced by its own authorization of their incorporation in that State on terms identical, word for word, with those prescribed in Ohio.[12]

The decedent, on July 31, 1920, applied for membership in the society through Rapid City Council No. 516, in Rapid City, South Dakota. He was 37 years old, a manager and salesman selling "packing products" on the road, in good physical condition and employed in an occupation of precisely the type contemplated for membership in this society.[13] He named his wife as his beneficiary in case of his death from accidental means. On August 19, 1920, he

[12] "An Act Providing for the Regulation and Control of All Fraternal Benefit Societies," approved Mar. 11, 1919, S. D. L., 1919, c. 232, pp. 240–253. For example, § 1 defines them as follows:

"Any corporation, society, order, or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with Section 5 hereof, is hereby declared to be a Fraternal Benefit Society."

See also, c. 31.21, "Fraternal Benefit Societies," S. D. Code of 1939, and cf. with Ohio definition in note 6, *supra*.

[13] "SEC. 2. Any white male citizen of the United States or British possessions in North America of good moral character and good general health; not under eighteen (18) and not over sixty (60) years of age, who has been actively and actually engaged for a term of not less than six months immediately preceding the date of his application as a commercial traveler, city salesman, wholesale house salesman, sales manager or merchandise broker, selling goods at wholesale or selling office, store, factory, railroad, mill or municipal equipment, for a manufacturer or wholesale dealer, or one who has had at least six months experience in either of the occupations named herein, and is thus engaged at the date of filing the application, and who is in good mental and physical condition may become a member of this Order if found acceptable." Art. II, Constitution of the society, 1922.

was accepted by the Supreme Council as an insured member of the society under "Class A." The certificate, No. 169655, evidencing this acceptance was executed at Columbus, Ohio, by the Supreme Counselor and Supreme Secretary. In 1922, following a brief suspension, he applied for reinstatement in what was then Black Hills Council No. 516 in Rapid City, South Dakota, and, on December 21, 1922, was reinstated as an insured member of the society under "Class A." In his application for this renewal, he referred to himself as a traveling salesman, selling meat to dealers, and named his mother, Elizabeth Shane of Mt. Vernon, South Dakota, as his beneficiary.[11] Thereafter, he remained in good standing and it is upon his

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[11] The certificate, No. 169655, then issued to him, and which is the primary basis for the respondent's claim, is as follows:

"INCORPORATED UNDER THE GENERAL LAWS OF THE STATE OF OHIO

CLASS A

INSURANCE CERTIFICATE

THE ORDER OF
UNITED COMMERCIAL TRAVELERS
OF AMERICA

COLUMBUS, OHIO

"An Association incorporated under the laws of the state of Ohio, hereby certifies that Ford Shane, a member of The Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an Insured Member of said Order under 'Class A,' beginning at twelve (12) o'clock, noon, Standard time, on the day this certificate is dated, and is entitled to all the rights and benefits which may be provided for such 'Class A' Insured Members in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date.

"This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Order, together with the application for insurance signed by said Insured Member, shall constitute the contract between

membership, evidenced by this certificate, also executed in Ohio, that this action depends. On May 8, 1931, he visited a physician's office in Rapid City, South Dakota, to be examined for stricture. The doctor applied a local anesthetic preliminary to introducing an instrument known as a "sound" for exploratory purposes. The local anesthetic was a drug known at "butyn." The record shows that butyn commonly was used by physicians for such a purpose; that it was properly administered in the usual and proper amount and was of the usual and proper strength; but that the decedent, unknown to anyone, was subject to a rare idiosyncrasy, as a result of the presence of which he suffered convulsions immediately following the administration of the anesthetic and died within two minutes.

In accordance with the procedure prescribed in the constitution of the society, the decedent's beneficiary promptly mailed to the society a notice of her [illegible] death. On June 8, 1931, the Supreme Executive Co[illegible]ee, in Columbus, Ohio, reviewed and disallowed her claim on its merits and mailed to her notice of such action. On June 16, she filed a complaint against the society in a circuit court for the State of South Dakota to recover death benefits, amounting to $6,300, claimed under Article IV of the

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said Order and said Insured Member and shall govern the payment of benefits, and any changes, additions or amendments to said Constitution, By-Laws or Articles of Incorporation, hereafter duly made, shall bind said Order and said Insured Member and his beneficiary or beneficiaries, and shall govern and control the contract in all respects.

"IN WITNESS WHEREOF, we have affixed our signatures and the seal of the Supreme Council, at Columbus, Ohio, this 21st day of December A. D. 1922.

"This certificate supersedes all insurance certificates issued of a prior date bearing this number.

s/ FRANK J. ROSSER
Supreme Counselor.
s/ WALTER D. MURPHY
Supreme Secretary."

SEAL

constitution of the society. The case was removed to the United States District Court for South Dakota because of diversity of citizenship. On September 2 it was tried, without a jury, and, on December 15, 1931, judgment was rendered for the mother with findings of fact and conclusions of law dealing with the merits of the case. This judgment, on February 27, 1933, was reversed, on its merits, by the United States Circuit Court of Appeals for the Eighth Circuit and judgment for costs was entered against Elizabeth Shane. 64 F. 2d 55.[15] Upon remand of the case to it, the District Court, on April 18, 1933, ordered "that the Judgment of the United States Circuit Court of Appeals in this matter be made the Judgment of this Court, and that all costs of this Court relating to such Mandate and Judgment, be taxed and allowed the defendant." (Unreported.) Thus, within less than two

[15] The Circuit Court of Appeals evidently relied, in part, on Article IV, § 7, of the constitution of the society which stated "Nor shall benefits under this Article be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability or loss" and said:

"There were no accidental means, but simply an unexpected or accidental result. The administration of the drug did not cause the idiosyncrasy, and, if the bodily injury which resulted in death was produced by the idiosyncrasy as a cause or means, then the administration of the drug was not the sole cause, and there would be no liability under the policy." 64 F. 2d 55, 59.

Relating to a provision in the same section that "This Order shall not be liable to any person for any benefit for any death, . . . resulting from . . . medical, mechanical or surgical treatment (except where the surgical treatment is made necessary by the accident), the intentional taking of medicine or drugs"; the Circuit Court of Appeals said:

"We think the administering of the drug must be placed in the category of medical or surgical treatment.

"If the administering of the drug in the case at bar did not constitute medical or surgical treatment, we should be at a loss how to classify such act." *Id.* at 59–60.

years, the case had been completely presented and heard by the District Court and the Circuit Court of Appeals and disposed of, on its merits, in favor of the society, with full recognition of the diversity of citizenship of the parties and in compliance with the time limits prescribed by the constitution of the society.

The present proceeding, however, resulted from the fact that, pursuant to stipulation of the parties, the District Court, on January 18, 1934, dismissed the case without prejudice to the filing of another suit. On June 15, 1934, the decedent's mother assigned her claim to Edward C. Wolfe, the present respondent, a citizen of Ohio, as trustee, to enforce collection of the claim. On the same day, the present action was filed in a circuit court of the State of South Dakota. An answer was entered and a stipulation was made to use the testimony which had been taken in the District Court in the previous case. There the case rested for six years. On October 19, 1940, an amended answer was filed raising, among others, the defense that this second action was in violation of the following Section of the constitution of the society:

"ARTICLE IV. INSURANCE

Waivers.

"SEC. 11. No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee.

"No Grand or Subordinate Council, officer, member or agent of any Subordinate, Grand, or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be hereafter enacted."

It is not disputed that such provision has been in such constitution since before the decedent's first application for membership in the society, and that it was printed in full on the back of the certificate of membership originally issued to the decedent. It further was alleged that this provision was valid and binding upon the members of the society by and under the laws of Ohio; that the highest court of that State had held that a fraternal benefit society, by its constitution and by-laws, could limit the time within which suit must be brought to recover for benefits promised to members; and that to deny the binding effect of that limitation on the plaintiff in such suit would be a violation of the full faith and credit clause of the Constitution of the United States (Art. IV, § 1), and a violation of the society's rights thereunder. We decide that issue here in favor of the society. No claim is made here that the society is barred from this defense by any waiver purporting to have been made on its behalf in connection with the dismissal of the earlier action without prejudice to filing another. See *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386. In this view of the case, it is not necessary to consider the other defenses.

In 1942 the case was presented before a judge of a circuit court of the State of South Dakota. Upon the death of that judge before a decision in the case it was heard, in 1943, by another judge of that court, largely upon the record made in 1931, in the United States District Court. The state court, on April 4, 1944, entered judgment in favor of the claimant, respondent herein. In 1945, the Supreme Court of the State of South Dakota, by a divided court, affirmed that judgment. — S. D. —, 18 N. W. 2d, 755. Because of the constitutional issue presented and its relation to previous decisions of this Court, we granted certiorari. 326 U. S. 712. The case was argued here February 28, 1946. Later it was restored to the docket, assigned for reargument before a full bench and reargued here November 12, 1946.

This is a clear-cut case of a claim based solely upon membership rights and obligations contained in the constitution of an incorporated fraternal benefit society, the terms of which are subject to amendment through the processes of a representative form of government authorized by the law of the state of incorporation. There is no evidence in the records of the three trials, no suggestion in the opinions of the lower courts, and no claim [redacted] arguments here that the decedent was not a bona [redacted] active member of the society, or that the society was acting otherwise than as a fraternal benefit society. This case, therefore, is to be distinguished from a claim for death benefits under an ordinary contract of accident insurance, whether issued by a stock or a mutual insurance company.

We rely upon the character of the membership obligation sued upon. There is substantial evidence to support a contention that the contract of membership, including all insurance rights, was made in Ohio and that many acts in connection with the contract were required to be performed in Ohio and were so performed. However, we do not rely upon the place of concluding the contract of membership or upon the place prescribed for its performance. We rely, rather, upon its character as something created, regulated and subject to change through a fraternal and representative form of intra-corporate government, dependent for its terms, continuity and unity upon public acts of Ohio creating and regulating fraternal benefit societies.

Although the respondent, suing as an Ohio citizen, has eliminated the South Dakota citizenship of the original beneficiary as a jurisdictional factor in this case, we do not hold that, for that reason, he may not urge the courts to consider the continuous South Dakota residence and citizenship of the decedent and of the named beneficiary in determining whether the public policy of South Dakota should yield to the full faith and credit clause of the Con-

stitution of the United States in giving recognition to the charter rights and obligations of the society as an Ohio corporation.

In order, however, to appreciate the nature of the obligation here relied upon, it is essential to see how completely its terms are interwoven with the enabling legislation authorizing the corporate charter and with the constitution and by-laws of the society, as well as with the member's application for and his certificate of membership in such society.

The enabling legislation, corporate charter and certificate of membership have been described. The application for membership contributes nothing further to the issue except to emphasize the integration which it demonstrates between the member and the articles of incorporation, constitution and by-laws of his society. There was no application for insurance separate from the application for membership. Benefits derived from membership flowed solely from the decedent's membership status.

There remain to be considered the constitution and by-laws of the society. These set forth the main body of the member's rights and obligations, including those of a fraternal and procedural nature as well as those relating to financial benefits and liabilities. The principal part of the record consists of printed copies of the charter, constitution and by-laws of the society, one as generally effective September 1, 1922, and the other as effective September 1, 1930. A comparison of these copies shows that many changes were made in the rights and obligations of members during the decedent's membership in the society.[16]

[16] Typical of these changes were those relating to the distribution, on a changed percentage basis, of funds raised by calls to meet insurance and other needs; changes in the classification of employments to be treated as hazardous enough to require the lowering of rates of disability benefits to be paid to members employed in them; and a new provision expressly recognizing the rights of uninsured members

The 1930 constitution, in pamphlet form, filled 90 closely printed pages. Its subject matter is outlined in the margin.[17] It is obvious how vital these terms, both

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to continue as members of the society, although disqualified physically from taking advantage of insurance benefits. There also was a change in the procedure governing future amendments.

[17] The 1930 constitution dealt with the following subjects and it is in them, as amended from time to time, that there can be found the rights and obligations of the members;

Article I. Name, Objects, Provision for Subordinate Councils, Grand Councils and The Supreme Council.

Article II. Subordinate Councils, Membership, Withdrawals, Transfer Cards, Delinquency, Suspensions, Reinstatement, Uninsured Membership, Officers and Elections, Duties of Officers, Vacancies in Office, Honorary Titles, Meetings and Quorum, Special Sessions, Reports, Per Capita Tax to Council having control and jurisdiction over the Subordinate Council, and Representation of Subordinate Councils in the Grand Council.

Article III. Funds, Provision for Widows' and Orphans' Fund, Assessment Fund, Distribution of Assessment Fund, Death Fund, Disability Fund, General Expense Fund and Reserve Funds. The Assessment Fund is created by assessments on insured members, in good standing, to provide a basis for meeting assessment calls. When calls are made upon such members, the proceeds are apportioned 30% to the Death Fund, 40% to the Disability Fund, 5% to the Reserve Funds and 25% to the General Expense Fund.

Article IV. Insurance. Members in good standing are subject to regular quarterly calls of $3 per insured member and the Supreme Counselor has the right to make as many calls, in an amount not to exceed $3 each, as may be required to pay in full all valid claims, together with expenses incurred in maintaining the society and conducting its business. Based on their physical condition, members become insured members of Class A or Class B. Those providing the poorer risk are put in Class B and are entitled to benefits of but one-half the amount of those provided for Class A members. The benefits are in the nature of indemnities against the result of bodily injuries "effected through external, violent and accidental means, . . . which shall be occasioned by the said accident alone and independent of all other causes." There are many limitations upon this liability and, in case of certain changes in the occupation or physical condition of a member, his right to benefits may be reduced or canceled. There are double indemnities for injuries resulting from accidents on pas-

in detail and as a whole, were to each member. The by-laws filled six pages. They consisted of 29 paragraphs dealing with the conduct of meetings of the Subordinate (or local) Councils, Grand (or regional) Councils and the Supreme (national or international) Council. Under such a constitution it is impossible to separate the member's insurance rights and obligations from his other

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senger trains, etc., and the coverage generally is related to risks normally encountered by commercial travelers. Specific exemptions are made of injuries resulting from engaging in certain hazardous sports or from being under the influence of liquor, etc. Those who may be named as beneficiaries are limited to specified degrees of family relationship. (The form of application makes express reference to the limitations as to beneficiaries contained in the statutes of Ohio.) Provision is made for notices and proofs of claims, for surgical examinations, etc. There is a strict prohibition in § 11 (quoted *supra*) against the waiver of provisions of the constitution and, in the same Section, there appears the six-month limitation, here in controversy, upon the time within which to bring suits to recover benefits after a claim has been disallowed by the Supreme Executive Committee.

Article V. Grand Councils, Charters for Subordinate Councils, Per Capita Tax payable to Grand Councils and detailed provisions for the operation of Grand Councils.

Article VI. Supreme Council, Charters for Grand Councils, Officers and Elections and detailed provisions for the conduct of the business of the Supreme Council, including the establishment of the Supreme Executive Committee. This committee is to consist of seven members, including the Supreme Counselor, Supreme Secretary, Supreme Treasurer and four specially elected members. It has large powers over the business and activities of the society. Among these provisions are those of examining insurance claims, deciding upon their validity and adjusting them.

Article VII. Prohibition of the use of malt or spirituous liquors in connection with meetings of the society.

Article VIII. Memorial Day in honor of the society's first Supreme Secretary.

Article IX. Special duty of every member to report the name of any member who is an extra hazardous, physical or moral risk.

Article X. Prohibition against donations of funds of the society.

Articles XI, XII an. XIII. Trials, Penalties and Appeals relating to violations of the Constitution, By-Laws and Rules, and the divulging

rights and obligations. While the statute authorizing the incorporation of fraternal benefit societies calls for "a lodge system with ritualistic form of work" and this is a natural expression of a close community of interest among members of a fraternal benefit society, yet it is not the formality of any ritual that is of primary significance from the legal point of view in this case. The more critical factors are that the society is a voluntary fraternal association "organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a . . . representative form of government, and which shall make provision for the payment of benefits" in accordance with certain statutory requirements.[18]

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of secrets of the society or conduct unbecoming a gentleman."

"ARTICLE XIV. AMENDMENTS. Section 1. Proposed amendment to this Constitution, By-Laws and Articles of Incorporation shall be submitted in writing and filed with the Supreme Secretary of the Order at least six (6) months before the convening of the annual session of the Supreme Council.

"The Supreme Secretary of the Order shall, at least four (4) months before the convening of such annual session, forward to all Grand and Subordinate Councils a copy of the proposed amendments.

"SEC. 2. No amendment to the Constitution, By-Laws or Articles of Incorporation shall be adopted unless it receives the affirmative vote of at least two-thirds (2-3) [2/3] of the members of the Supreme Council present, entitled to vote, at the session when such amendment is voted upon.

"SEC. 3. All amendments to this Constitution, By-Laws and Articles of Incorporation shall take effect on the first day of September following the session of the Supreme Council at which they were adopted, unless the date for becoming effective is otherwise specified by the Supreme Council.

"SEC. 4. All recommendations or resolutions adopted by the Supreme Council which adds [add] to or conflict with this Constitution or By-Laws shall be presented to the Supreme Council at its next annual session as an amendment to the Constitution or By-Laws and shall not become effective until such amendments have been approved by a two-thirds vote of the members present entitled to vote." (Section 4 was added between 1922 and 1931.)

[18] See note 7, *supra*.

Historically, many groups of people have been drawn together naturally into fraternal organizations for social and economic reasons. Some of these have developed into those forms of fraternal benefit societies now officially recognized by many states. The relationships between the members of such societies are contractual in that they are voluntarily undertaken in consideration of the like obligations of others. However, interwoven with their financial rights and obligations, they have other common interests incidental to their memberships, which give them a status toward one another that involves more mutuality of interest and more interdependence than arises from purely business and financial relationships. This creates—

> "The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law, ... The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation." [19]

The relationship thus established between a member and his fraternal benefit society differs from the ordinary contractual relationship between a policyholder and a separately owned corporate or "stock" insurance company. It differs also from that between an insured member of the usual business form of a mutual insurance company and that company. The fact of membership in the Ohio fraternal benefit society is the controlling and central feature of the relationship. As long as he remains a member, the terms of his membership, including obli-

[19] *Modern Woodmen* v. *Mixer*, 267 U. S. 544, 551.

gations and benefits relating to the insurance funds of the society, are subject to change without his individual consent. The control over those terms is vested by him and his fellow members in the elected representative government of their society as authorized and regulated by the law of Ohio. Upon that law the continued existence of the society depends. The foundation of the society is the law of Ohio. It provides the unifying control over the rights and obligations of its members. *Sovereign Camp* v. *Bolin*, 305 U. S. 66, 75, discussed *infra*. It is this dependence of membership rights upon the public acts of the domiciliary state, supported by the requirement that full faith and credit shall be given in each state to those public acts, that has been recognized by this Court in the unbroken line of decisions reviewed in this opinion.

The decisions passing upon this comparatively narrow issue are to be distinguished from those which deal only with the well established principle of conflict of laws that "If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose." Restatement, Conflict of Laws § 603 (1934). It is to that general principle that such early cases as *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, and *M'Elmoyle* v. *Cohen*, 13 Pet. 312, have reference. The decisions here reviewed are to be distinguished, likewise, from those supporting the converse general principle that "If action is not barred by the statute of limitations of the forum, an action can be maintained, though action is barred in the state where the cause of action arose." Restatement, Conflict of Laws § 604 (1934). Neither of these general statements is here questioned. An obvious need for modification of the latter statement, however, has led many states to place a limitation upon it through the adoption of the so-called "borrowing statutes" of limitations. The result is that today "Statutes frequently provide that an action may

not be maintained if it has been barred by the statute of limitations at the place where the action accrued or, in some cases, at the domicil of the defendant." *Id.* § 604, comment *b*. These numerous "borrowing statutes" demonstrate the general recognition of the sound public policy of limiting, under some circumstances, the application of the general statute of limitations of the state of the forum. The full faith and credit clause applied, as in the present case, is but another limitation voluntarily imposed, by the people of the United States, upon the sovereignty of their respective states in applying the law of the forum. See *Broderick* v. *Rosner*, 294 U. S. 629, 643, and *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276–277, discussed *infra*.

Even without the compelling force of statutory or constitutional provisions, the courts have recognized other restrictions on the law of the forum. For example, it is well established that, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period.[20] Such shorter periods, written into private contracts, also have been held to be entitled to the constitutional protection of the Fourteenth Amendment under appropriate circum-

[20] "The policy of these statutes [of limitation] is to encourage promptitude in the prosecution of remedies. They prescribe what is supposed to be a reasonable period for this purpose, but there is nothing in their language or object which inhibits parties from stipulating for a shorter period within which to assert their respective claims." *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386, 390; approved, *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 298.

See also, *Appel* v. *Cooper Ins. Co.*, *supra*; *Bartley* v. *National Business Men's Assn.*, *supra*; *Young* v. *Order of United Commercial Travelers*, *supra*; *Burlew* v. *Fidelity & Casualty Co. of N. Y.*, 276 Ky. 132, 122 S. W. 2d 990; see note, 121 A. L. R. 758; 29 Am. Jur. 1039.

stances. See *Home Ins. Co.* v. *Dick*, 281 U. S. 397, and *Hartford Accident & Indemnity Co.* v. *Delta Pine Land Co.*, 292 U. S. 143, mentioned again *infra*.

The instant case presents additional facts which distinguish it from the cases governed by the foregoing general rules. The principal distinguishing feature of this case is the membership of the decedent in the Ohio fraternal benefit society, which South Dakota made available to him through the license issued to it to do business in South Dakota. Even conceding, for purposes of argument, that the decedent's membership contract was entered into in South Dakota, rather than where it was accepted at the society's home office in Ohio, it is the character of that fraternal benefit membership, created and defined by the laws of Ohio and fostered by the fraternal benefit laws of South Dakota, that is at issue. Conceding further that, as interpreted in this case by the Supreme Court of South Dakota, the provision of § 897 of the South Dakota Code (quoted near the beginning of this opinion), generally outlawing contractual time limits on the enforcement of contractual rights by legal proceedings, is an attempt to make void the time limit included in § 11 of Article IV of the constitution of this Ohio fraternal benefit society, we then are brought face to face with the full faith and credit clause of the Constitution of the United States. It is here that we reach the line of decisions of this Court, extending from *Royal Arcanum* v. *Green*, 237 U. S. 531, to *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, 207–208, 210–211, discussed *infra*. These decisions are directly in point. Without questioning this Court's recognition of the common law principle of conflict of laws as to the control by each state over the application of its own statutes of limitations, this line of decisions demonstrates this Court's simultaneous recognition of the necessary scope of the full faith and credit clause in this field. These cases unwaveringly safeguard, in each state, the effectiveness of the public

acts of every other state as expressed in the rights and obligations of members of fraternal benefit societies. Such societies exist by virtue of such state legislation, and the rights and obligations incident to membership therein are as much entitled to full faith and credit as the statutes upon which they depend.

The respondent's claim to benefits is based upon Item (12) of § 4 of Article IV of this constitution which specifies the death benefits derived from the membership of "Class A" members. The prohibition limiting the time for suing on this claim, which is relied upon as the defense of the society, appears as § 11 of the same Article IV. Section 11 deals with the decedent's membership relationship to the society no less than does § 4. The limitation, resulting from § 4, on the amount of the benefit to be paid to beneficiaries and the limitation, resulting from § 11, on the time when litigation may be brought by beneficiaries, are of comparable character. To permit recovery here would be to permit recovery on a special and unauthorized type of membership more favorable to decedent than was available to other members. This would fail to give full faith and credit to the terms of membership authorized by Ohio by placing an additional liability on the society beyond that authorized by Ohio or accepted by the society.

Underlying the defense of the society is the requirement that § 11 be valid under the law of Ohio as the State of incorporation. Such validity was admitted by the Supreme Court of South Dakota in its opinion below. — S. D. —, 18 N. W. 2d 755, 756. "The parties to a contract of insurance may, by a provision inserted in the policy, lawfully limit the time within which suit may be brought thereon, provided the period of limitation fixed be not unreasonable." *Appel* v. *Cooper Ins. Co.*, 76 O. S. 52 (Syllabus, No. 1, by the court), 80 N. E. 955. The court there enforced a clause in a fire insurance policy

providing that no action for recovery of any claim shall be sustainable in any court unless commenced within six months after the fire itself, even though such actions were prohibited during most of the first three of those six months. In *Bartley* v. *National Business Men's Assn.*, 109 O. S. 585, 143 N. E. 386, the Supreme Court of Ohio approved the *Appel* case and applied it to a two-year contractual limitation for suing an Ohio mutual protective association on a claim for accidental death. See also: *Modern Woodmen* v. *Myers*, 99 O. S. 87, 124 N. E. 48, upholding a strict adherence to limitations stated in the by-laws of fraternal benefit societies; *Portage County Mutual Fire Ins. Co.* v. *West*, 6 O. S. 599, emphasizing the reasonableness of short periods for commencing suits on claims against mutual companies; *Young* v. *Order of United Commercial Travelers*, 142 Neb. 566, 7 N. W. 2d 81, recognizing the validity in Ohio of the precise provision of the constitution of the society here at issue, and sustaining its effectiveness in Nebraska by force of the full faith and credit clause of the Constitution of the United States; and *Roberts* v. *Modern Woodmen*, 133 Mo. App. 207, 113 S. W. 726, sustaining, in Missouri, a one-year limitation in the insurance contract of an Illinois fraternal benefit society, in the face of a contrary local policy as to Missouri contracts limiting the time within which suits may be instituted. See also, *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386.

Starting with the recognized validity under the law of Ohio, of Article IV, § 11 of the constitution of the petitioning society, that society has a complete defense to the present action unless such § 11 is not enforcible in the courts of South Dakota because of a contrary public policy of that State. We examine first the claim that such a contrary policy exists, and then show why, on the principles established by this Court, the full faith and credit clause of the Constitution of the United States requires

the courts of South Dakota to give effect to the public acts of Ohio as expressed in such § 11.

The general statutes of limitations which have been in effect in South Dakota throughout the period involved in this case have prescribed limits varying from 20 years to one year according to the subject of the action.[21] "An action upon a contract, obligation, or liability, express or implied," was required to be commenced within six years.[22] On the other hand the State required the insertion in every health or accident policy issued in the State, a standard contractual provision limiting to two years the time for bringing an action upon it.[23] Throughout this period, the South Dakota statutes, moreover, have expressed no hostility toward domestic or foreign fraternal benefit societies. In fact, they have provided for the incorporation, license and supervision of such societies in terms closely comparable to those of the statutes of Ohio.[24]

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[21] §§ 2294–2305, S. D. Rev. Code, 1919; § 33.0232, S. D. Code of 1939.

[22] § 2298, S. D. Rev. Code, 1919; § 33.0232 (4), S. D. Code of 1939.

[23] "No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy." § 3 (14), c. 229, S. D. L., 1919, at p. 235. See also, § 31.1702 (14), S. D. Code of 1939. This section is indicative of a state policy approving the shortening of the general statute as applied to accident policies, but it does not apply directly to or affect transactions of fraternal benefit societies because they are excluded from the general insurance statutes and are placed under the licensing provisions quoted in note 10, *supra*. The petitioner's constitution, filed under that requirement, fully disclosed its provision on this subject. § 12 (3), c. 229, S. D. L., 1919; § 31.1708 (3), S. D. Code of 1939.

[24] Notes 11 and 12, *supra*.

Both the alleged prohibition by South Dakota of such a contractual limitation as is contained in § 11 and the public policy of South Dakota against such limitations depend entirely upon its statute directed generally against contractual limitations upon rights to sue on contracts which is quoted, *supra*, from § 897 of the Revised Code of South Dakota, 1919.[25]

The public policy so declared is not directed specifically against fraternal benefit societies or their insurance membership requirements. In this very case, however, the Supreme Court of South Dakota, in its decision below, expressly held that this statute applies to and renders void in South Dakota § 11 of Article IV of this society's constitution. We thus are confronted with an inescapable issue as to the unconstitutionality of an attempt, through this statute, to declare void in South Dakota a provision of the constitution of an incorporated fraternal benefit society which comes within the authorization of a public act of the State of Ohio and is valid under the laws of that State. This is not a new issue in this Court. It falls squarely within a line of decisions consistently upholding the applicability of the full faith and credit clause in support of comparable provisions in the constitution of such a society.

In *Royal Arcanum* v. *Green*, 237 U. S. 531, Mr. Chief Justice White, writing on behalf of a unanimous Court, pointed out that the full faith and credit clause there required the state of the forum (New York) to give effect to a law of the state of incorporation (Massachusetts) pursu-

[25] The present counterpart of that statute appears in § 10.0705 of the South Dakota Code of 1939:

"10.0705. *Restraint of legal proceedings; void.* Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void."

ant to which a fraternal benefit society had amended its constitution so as to increase the assessment rate upon the complaining members, although the trial court had found that their contract of membership was entered into, made and completed in the State of New York, and that under the law of that State, the member would not be bound by such increase. 206 N. Y. 591, 597. In terms which have not been overruled or modified by it in later decisions, this Court there explained why the full faith and credit clause requires controlling effect to be given to the law of the state of incorporation in interpreting and determining the enforcibility of the rights and obligations of members contained in the constitution and by-laws of such societies. It said:

> ". . . as the charter was a Massachusetts charter and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that State, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws. Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding on the one hand that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all but by applying many divergent, variable and conflicting criteria. In fact their destructive effect has long

since been recognized. *Gaines* v. *Supreme Council of the Royal Arcanum*, 140 Fed. Rep. 978; *Royal Arcanum* v. *Brasheurs*, 89 Maryland, 624. And from this it is certain that when reduced to their last analysis the contentions relied upon in effect destroy the rights which they are advanced to support, since an assessment which was one thing in one State and another in another, and a fund which was distributed by one rule in one State and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed. It was doubtless not only a recognition of the inherent unsoundness of the proposition here relied upon, but the manifest impossibility of its enforcement which has led courts of last resort of so many States in passing on questions involving the general authority of fraternal associations and their duties as to subjects of a general character concerning all their members to recognize the charter of the corporation and the laws of the State under which it was granted as the test and measure to be applied." *Id.* at 542–543.

In *Modern Woodmen* v. *Mixer*, 267 U. S. 544, this Court unanimously followed the same reasoning and Mr. Justice Holmes, in language previously quoted *supra*, emphasized the "complex and abiding relation" of a membership in a fraternal benefit society. He said, "as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation." *Id.* at 551. In that case, the Court held that the full faith and credit clause required the state of the forum (Nebraska) to give effect to the law of the state of incorporation (Illinois) pursuant to which a by-law of the fraternal benefit society had been enacted requiring that the continued absence of any member, although unheard from for ten years, should not give his beneficiary the right to recover death benefits until the full term of the member's

expectancy of life had expired. This was so held in the face of a rule of law in the state of the forum that seven years of unexplained absence were sufficient to establish death for purposes of such a recovery. This Court stated that neither the public policy of the forum nor the opinion of the Supreme Court of that State that the by-law was unreasonable, nor the fact that the membership contract had been made in South Dakota, nor the fact that the by-law itself had been adopted several years after the membership relation had commenced, could affect this result. This Court said:

> "We need not consider what other States may refuse to do, but we deem it established that they cannot attach to membership rights against the Company that are refused by the law of the domicil. It does not matter that the member joined in another State." *Id.* at 551.

In *Broderick* v. *Rosner*, 294 U. S. 629, this Court, with Mr. Justice Cardozo noting dissent, applied this principle to a suit brought in a New Jersey court against certain citizens of New Jersey to recover unpaid assessments levied upon them as stockholders in a bank incorporated under the laws of New York. A New Jersey statute sought to prohibit, in the courts of New Jersey, proceedings for the enforcement of any stockholder's statutory personal liability imposed by the laws of another state, except in suits for equitable accounting, to which the corporation, its legal representatives, and all of its creditors and stockholders were to be necessary parties. Practically, this amounted to an attempt to bar such suits from the New Jersey courts. This Court, however, said. "It is sufficient to decide, that since the New Jersey courts possess general jurisdiction of the subject matter and the parties, and the subject matter is not one as to which the alleged public policy of New Jersey could be controlling.

the full faith and credit clause requires that this suit be entertained [without compliance with the special New Jersey statute]." *Id.* at 647.

Mr. Justice Brandeis, in stating the reasoning of the Court in the *Broderick* case, said:

> ". . . the full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another State or has been conferred by its statutes. See *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 160; *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, *ante*, p. 532, at p. 546. But the room left for the play of conflicting policies is a narrow one. . . . For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law, by which local policy is permitted to dominate rules of comity.
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> "Here the nature of the cause of action brings it within the scope of the full faith and credit clause. The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York, as the State of incorporation. 'So much so,' as was said in *Converse* v. *Hamilton*, 224 U. S. 243, 260, 'that no other State properly can be said to have any public policy thereon. . . .' . . . In respect to the determination of liability for an assessment the New Jersey stockholders submitted themselves to the jurisdiction of New York. For 'the act of becoming a member [of a corporation] is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation.' *Modern Wood-*

men of America v. *Mixer*, 267 U. S. 544, 551." [26] *Id.* at 642–644.

In *Milwaukee County* v. *White Co.*, 296 U. S. 268, Mr. Justice Stone, speaking for the Court, said:

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Id.* at 276–277.

In *Sovereign Camp* v. *Bolin*, 305 U. S. 66, this Court unanimously approved the foregoing principles and authorities and applied them to a case that goes even beyond the issue presented by the instant case. In that case, Bolin joined a Missouri lodge of a fraternal benefit society incorporated in Nebraska. His certificate of membership was delivered to him in Missouri, and he paid his dues and assessments in Missouri. He was over 43 when he joined the society in June, 1896. At that time, one of its by-laws provided that a member joining at an age greater than 43 was entitled to life membership without payment of further dues or assessments after his certificate had been outstanding 20 years. On his certificate were endorsed the words "Payments to cease after 20 years," and it stated that, if in good standing, he would be entitled to participate in the beneficial fund up to $1,000 payable to his beneficiaries and to $100 for placing a monument

[26] Citing also for comparison, *Royal Arcanum* v. *Green*, 237 U. S. 531; *Hancock National Bank* v. *Farnum*, 176 U. S. 640; *McDermott* v. *Woodhouse*, 87 N. J. Eq. 615, 618, 619; and for reference, *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527, 537–538; *Haukins* v. *Glenn*, 131 U. S. 319, 329; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 229–230; *Hazzigan* v. *Berydoll*, 270 U. S. 560, 564.

at his grave. He paid his dues and assessments for the required 20 years but ceased doing so in July, 1916. Upon his death, his beneficiaries sued in a state court of Missouri to recover on his certificate. They were met by the defense that, in *Trapp* v. *Sovereign Camp of the Woodmen of the World*, 102 Neb. 562, 168 N. W. 191, the Supreme Court of Nebraska, in 1918, in a representative suit binding all members, had held that the by-law of the society, which had purported to authorize the "payments to cease" certificates, was *ultra vires* and void. In the suit by Bolin's beneficiaries, the Supreme Court of Missouri then held that from 1889 to 1897, including the time when Bolin joined the society, there had been no Missouri statute providing for the registration and filing of reports in Missouri by foreign fraternal benefit societies and that there had been no provision exempting them from the operation of the general insurance laws of Missouri. The Supreme Court of Missouri, accordingly, applied what it considered to be the Missouri law and public policy. On this basis, it disregarded the special status of the claim as one derived from the decedent's membership in a Nebraska fraternal benefit society and disregarded the Nebraska law, as interpreted by the Supreme Court of Nebraska, which had held the decedent's purported exemption from payments after 1916 to be *ultra vires* and void. The Missouri court treated his membership as a Missouri contract, subject to the general insurance laws of Missouri, interpreted his certificate as an ordinary Missouri contract, not *ultra vires* under the law of Missouri, and held the society liable upon it. This Court, however, reversed that judgment on the ground that, under the full faith and credit clause, the Missouri courts were required to accept the Nebraska law as to the validity of the corporate by-law.

Mr. Justice Roberts, writing for the Court said:

"We hold that the judgment denied full faith and credit to the public acts, record and judicial proceedings of the State of Nebraska.

". . . The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the State of incorporation. Another State, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of the domicile.

. . . . . .

"The court below was not at liberty to disregard the fundamental law of the petitioner and turn a membership beneficiary certificate into an old line policy to be construed and enforced according to the law of the forum. The decision that the principle of *ultra vires* contracts was to be applied as if the petitioner were a Missouri old line life insurance company was erroneous in the light of the decisions of this court which have uniformly held that the rights of members of such associations are governed by the definition of the society's powers by the courts of its domicile.

. . . . . .

"Under our uniform holdings the court below failed to give full faith and credit to the petitioner's charter embodied in the statutes of Nebraska as interpreted by its highest court." *Id.* at 75 (citing *Modern Woodmen* v. *Mixer, supra*, and *Royal Arcanum* v. *Green, supra*), 78, 79.

This pronouncement as to the uniform holdings of this Court has not been repudiated or modified. In the pres-

ent case, the decisions relied upon by the court below, in reaching a contrary result, deal with related but distinguishable situations.

In *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201, this Court, in a unanimous opinion written by Mr. Chief Justice Stone, held that the full faith and credit clause does not apply to an action brought in the courts of Georgia to collect assessments against an alleged member of an insolvent mutual insurance company, according to the terms of his contract of membership, unless such membership first be proved. The Court, however, recognized that corporate procedure in conformity with the statutes of the state of incorporation is entitled to full faith and credit so far as the necessity and amount of the assessment of stockholders' liability is concerned, and said at pp. 207–208: "The like principle has been consistently applied to mutual insurance associations, where the fact that the policyholders were members was not contested," citing *Royal Arcanum* v. *Green*, 237 U. S. 531; *Modern Woodmen* v. *Mixer*, 267 U. S. 544. And further:

> "Where a resident of one state has by stipulation or stock ownership become a member of a corporation or association of another, the state of his residence may have no such domestic interest in preventing him from fulfilling the obligations of membership as would admit of a restricted application of the full faith and credit clause. But it does have a legitimate interest in determining whether its residents have assented to membership obligations sought to be imposed on them by extrastate law to which they are not otherwise subject." *Id.* at 210–211.

These recent references to the principle which is involved in the instant case constitute a significant recognition of its consistency with the decisions of this Court in related but distinguishable situations. The *Pink* case appropriately emphasized the distinction between, on the

one hand, a sound local public policy which closely scrutinizes the proof of the entry into a certain relationship and, on the other hand, a local public policy which, in the face of the full faith and credit clause, would seek to eliminate important terms from that relationship after it has been entered into.

Contemporaneously with this development of the policy of this Court, applying the full faith and credit clause in support of membership obligations in fraternal benefit societies, it has considered the same clause in several related situations. For example, it has applied it in requiring the Minnesota courts to recognize the obligation of members of the safety fund department of a Connecticut life insurance company to meet assessments levied upon them pursuant to a mutual assessment plan valid under the laws of Connecticut. *Hartford Life Ins. Co.* v. *Ibs*, 237 U. S. 662. This was a unanimous opinion written by Mr. Justice J. R. Lamar. In another unanimous opinion in *Hartford Life Ins. Co.* v. *Barber*, 245 U. S. 146, at p. 150, Mr. Justice Holmes said, "The powers given by the Connecticut charter are entitled to the same credit elsewhere as the judgment of the Connecticut court. *Supreme Council of the Royal Arcanum* v. *Green*, 237 U. S. 531, 542." See also, *John Hancock Ins. Co.* v. *Yates*, 299 U. S. 178, 182–183.

Without reliance upon the full faith and credit clause, a somewhat similar result has been recognized in the protective effect of the Fourteenth Amendment of the Constitution of the United States, prohibiting the deprivation of any person of his property without due process of law. A like policy underlies § 10 of Article I of the Constitution, prohibiting a state from passing any law impairing the obligation of contracts. Accordingly, in *Home Ins. Co.* v. *Dick*, 281 U. S. 397, in an opinion by Mr. Justice Brandeis, this Court relied upon the Fourteenth Amendment in dealing with ordinary insurance policies. It

upheld unanimously the effectiveness of a contractual one-year limitation upon the right to sue for recovery of a loss under a marine fire insurance policy, where such limitation was good in Mexico (in which country the insurance was written and was to be performed), as against a two-year general statute of limitations of the state of the forum (Texas). In *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, in an opinion by Mr. Justice Roberts, the Court again relied upon the Fourteenth Amendment. There it upheld unanimously a 15-month contractual limitation upon the right to sue upon a fidelity bond. This limitation was valid in Tennessee, where such bond was entered into, and it was here upheld against the local policy of the state of the forum (Mississippi).

In a related but readily distinguishable series of cases dealing with conflicting claims arising under Workmen's Compensation Acts, emphasis has been placed upon the rule stated by Mr. Justice Stone, for a unanimous Court, in *Alaska Packers Assn.* v. *Comm'n*, 294 U. S. 532, 547. He there said:

> ". . . the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."

In *Pacific Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493, again speaking for the Court, he added at p. 502:

> "And in the case of statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that the full faith and credit clause

> does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."

See also, *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, in which, as Chief Justice, he upheld the controlling effect of the full faith and credit clause as against the law of the forum.

The language quoted from the *Pacific Ins. Co.* case, *supra*, also was quoted with approval in *Williams* v. *North Carolina*, 317 U. S. 287, at p. 296. In the latter case, on the basis of the full faith and credit clause, this Court gave effect to the law of the domicil in upholding the validity of a divorce, as against the law of the forum.

We find no conflict between the position taken in the instant case and that taken in the foregoing cases or in *Griffin* v. *McCoach*, 313 U. S. 498, *Hoopeston Co.* v. *Cullen*, 318 U. S. 313, or in other decisions of this Court upon which reliance has been placed to support an opposite conclusion.

Accepting the view expressed in these related cases, that this Court should not give what Mr. Justice Stone called a mere "automatic effect to the full faith and credit clause,"[27] this Court consistently has upheld, on the basis of evaluated public policy, the law of the state of incorporation of a fraternal benefit society as the law that should control the validity of the terms of membership in that corporation. The weight of public policy behind the general statute of South Dakota, which seeks to avoid certain provisions in ordinary contracts, does not equal that which makes necessary the recognition of the same terms of membership for members of fraternal benefit societies wherever their beneficiaries may be. This is especially obvious

[27] *Alaska Packers Assn.* v. *Comm'n*, *supra*, at p. 547.

where the state of the forum, with full information as to those terms of membership, has permitted such societies to do business and secure members within its borders. There would be little sound public policy in permitting the courts of South Dakota to recognize an action to collect the full benefits to be derived from a membership in the petitioner society, while, at the same time, nullifying other integral terms of that same membership which limit certain rights of beneficiaries to enforce collection of such benfits. It is of the essence of the full faith and credit clause that, if a state gives *some* faith and credit to the public acts of another state by permitting its own citizens to become members of, and benefit from, fraternal benefit societies organized by such other state, then it must give *full* faith and credit to those public acts and must recognize the burdens and limitations which are inherent in such memberships. In this case, the state of the forum has licensed the society to do business within its borders. It is concerned as much with the validity and fairness of the obligations to be enforced by assessments against its citizens who become members of the society as it is with the benefits to be claimed by those who become its beneficiaries. In this case, the full faith and credit clause, therefore, requires that effect be given to the six-month limit, prescribed by the society and authorized by Ohio, upon the right to commence this action. Such limit expired before this action was commenced and the judgment of the Supreme Court of South Dakota in favor of the respondent accordingly is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 32.—October Term, 1946.

The Order of United Commercial Travelers of America, a Corporation, Petitioner, v. Edward C. Wolfe.	On Writ of Certiorari to the Supreme Court of the State of South Dakota.

[June 9, 1947.]

Mr. Justice Black, with whom Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge join, dissenting.

The Order of United Commercial Travelers is a corporation chartered under the laws of Ohio with power to do a fraternal insurance business. It sells contracts of insurance in Ohio. South Dakota has licensed the corporation to sell fraternal insurance policies in that state. Under this permission, the corporation has an office, called a local council, in Black Hills, South Dakota, vested with power to administer "the business and fraternal affairs of the Order."

The insured, a citizen and resident of South Dakota, applied to the Black Hill's office for membership and an insurance policy. After the application had been accepted and an insurance certificate signed at the petitioner's home office in Ohio, it was "forwarded by the defendant corporation to South Dakota for delivery to the insured." From then until his death in South Dakota, the insured paid his premiums to the corporation's Black Hill's office. During all that period his beneficiary lived in that state. This action was brought in a court of that state on behalf of the beneficiary after the corporation had refused to pay the claim.

The association denied liability because this suit had not been commenced within six months after the association

had disallowed the beneficiary's claim. This is required by the corporation's constitution which is incorporated by reference into its contracts of insurance. And in a series of cases, cited in the Court's opinion, the Supreme Court of Ohio has held that suits brought in Ohio courts on mutual, stock company, or fraternal insurance contracts, may be barred by contractual arrangements between the parties which require that suit be brought within a shorter period than that provided by the Ohio limitations statutes.

But the South Dakota Supreme Court has held that a statute of that state which provides that "every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void," S. D. Code § 10.0705 (1939), renders the limitation provision in this contract unenforceable in her courts. This Court today reverses the South Dakota decision on the ground that its refusal to enforce the private contract is a denial of full faith and credit to the "public Acts, Records, and judicial Proceedings" of Ohio. U. S. Const., Art. IV, § 1.

First. More than one hundred years ago this Court said that to require a state to apply the "limitation laws" of another state rather than its own would reduce it "to a state of vassalage," presenting the anomaly "of a sovereign state governed by the laws of another sovereign." *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 466–467. A few years later the Court was asked to hold that the full faith and credit clause barred a state from applying its own statute of limitations in a suit brought on a cause of action which had arisen in another state. On that question the Court did not "entertain a doubt"; the holding was that it could not "be even plausibly inferred" that the state in which the suit was brought was denied that power by the full faith and credit clause. *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 324, 328. While the case then under consideration involved a suit on a judgment rendered in

another state, the broad ruling was that, so far as the full faith and credit clause is concerned, a state has power to apply its own statute of limitations in every kind of action and without regard to where the cause of action arose.

The constitutional force of the *M'Elmoyle* refusal to require a forum state to give full faith and credit to a foreign state's statute of limitations is not weakened in the slightest by the fact that some states have seen fit to adopt "borrowing statutes." See *Anderson* v. *Helmers*, p. —, *ante*, at, note 3. For other states, notably South Dakota here, have adopted statutes with purposes quite opposite to that of borrowing statutes. And under the *M'Elmoyle* rule, whichever limitations policy a forum state chooses to follow—to borrow or to refuse to borrow—it is free, so far as the full faith and credit clause is concerned, to do so.

The plain effect of today's decision is to overrule the *M'Elmoyle* case. And it does so, despite the fact that the holding of that case has never before been cited with disapproval; in fact, that holding has been repeatedly approved and reaffirmed throughout the years since it was decided.[1] The Court distinguishes the *M'Elmoyle* rule, and in fact relies generally for its decision upon the line of decisions in which *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544, is the leading case. But the statute of limitations was not in issue in the *Mixer* case, the case on which it relied, or the cases which have since relied on it. The *M'Elmoyle* case was not even cited in the Court's

[1] *Townsend* v. *Jemison*, 9 How. 407, 410; *Bank of Alabama* v. *Dalton*, 9 How. 522, 528; *Bacon* v. *Howard*, 20 How. 22, 25; *Christmas* v. *Russell*, 5 Wall. 290, 300; *Amy* v. *Dubuque*, 98 U. S. 470, 471; *Campbell* v. *Holt*, 115 U. S. 620, 626; *Campbell* v. *Haverhill*, 155 U. S. 610, 618. See also *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304; *Michigan Ins. Bank* v. *Eldred*, 130 U. S. 693; *Bank of United States* v. *Donnally*, 8 Pet. 361; *M'Cluny* v. *Silliman*, 3 Pet. 270.

Mixer opinion; nor does anything said in it detract from the rule of the *M'Elmoyle* case that states can, despite the full faith and credit clause, apply their own statutes of limitation.[2] Yet the Court now treats the *Mixer* case as controlling, and holds that the full faith and credit clause deprives South Dakota of power to apply its own statute of limitations.[3]

But more than that, the "state of vassalage" to which the Court's decision here reduces South Dakota is not even in subordination to the laws of another state. The Court's opinion means that South Dakota must yield to a "law"

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[2] The Court also refers to *Hartford A. & I. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, and *Home Ins. Co.* v. *Dick*, 281 U. S. 397. The Court does not rest its decision on the due process clause. But the decisions in those cases went on the due process clause; and, far from supporting the holdings here, are actually inconsistent with it. If they are to be followed they stand for the propositions that a state which has no interest at all, or only a minor interest in the transaction sued on, cannot, because of the mere accident of supplying the judicial forum, apply its own statute of limitations so as to defeat the terms of a contract valid in the jurisdiction where the obligation was initiated, negotiated, and completed. The two cases cast considerable doubt on Ohio's power to have applied its limitation statute had this suit been filed there; conversely, they provide rather persuasive argument to support a contention that South Dakota's statute should control liability here in view of that state's considerable interest, even beyond that of providing the forum of this action.

[3] The Court takes the view that it is well established that a contract provision limiting the time within which suit can be brought may override a state's statute of limitations providing a longer period. For this proposition it cites *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386. That case came from a Federal Circuit Court in Missouri where the sole problem posed or decided was whether under Missouri law or general federal law a contract limitation violated the policy of Missouri expressed in its statute of limitations. But *see Guaranty Trust Co.* v. *York*, 326 U. S. 99. There was no full faith and credit question, due process question, or any other constitutional question. *M'Elmoyle* v. *Cohen*, *supra*, was not cited in the *Riddlesbarger* case. Nor was it relevant because no foreign law was put forward which might require Missouri to give full faith and credit to it.

adopted by the members of an Ohio-created private fraternal insurance association. That "law," appearing only in the private association's constitution, provides in the same kind of language that legislatures ordinarily use in their statutes of limitation that "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date of the claim for said benefits is disallowed by the Supreme Executive Committee."

The nearest that this private association's "law" comes to being a law of Ohio is that Ohio permits but does not require it. Because the private association's constitution was incorporated by reference in the policy contract, including the constitution's "statute of limitations," the Court now holds that this corporate "statute of limitations" prohibits application of South Dakota's statute of limitations. Thus the Court's holding is that an Ohio private corporation's laws have a higher constitutional standing than an Ohio law or judgment would have—unless, as seems to be true, *M'Elmoyle* v. *Cohen*, *supra*, and subsequent cases approving it are now being overruled. It would be quite a radical departure from this Court's previous authorities to hold that the full faith and credit clause bars a government from applying its own statutes of limitations to suits brought in its courts, a power which, this Court said in its *M'Elmoyle* decision, governments have exercised since remote antiquity. *Id.* at 327. It is a far greater departure to hold that a state's limitation statute must take second place to the limitations rules adopted by a privately operated corporation.

It should come as quite a surprise to Ohio that its state policy can supplant South Dakota's statute of limitations, since Ohio's highest Court follows the *M'Elmoyle* rule that "Statutes of limitation relate to the remedy, and are, and must be, governed by the law of the forum: for it is conceded, that a court which has power to say when its doors

shall be opened, has also power to say when they shall be closed." *Kerper* v. *Wood*, 48 Ohio St. 613, 622, 29 N. E. 501, 502. And the principle there announced was followed by the Ohio Supreme Court as late as 1943. *Payne* v. *Kirchwhem*, 141 Ohio St. 384, 48 N. E. 2d 224; *cf.* *Anderson* v. *Helmers*, p. — *ante*.

Second. Leaving aside the *sui generis* features of a forum state's power over limitations of actions in its courts, the present holding violates other established rules concerning a state's power to govern its own local affairs and to protect from overreaching contracts persons in whom the state has a legitimate interest. See *Griffin* v. *McCoach*, 313 U. S. 498; *Pink* v. *A. A. A. Highway Express*, 314 U. S. 201. I had considered it well settled that if an insurance company does business at all in a state, its contracts are "subject to such valid regulations as the State may choose to adopt." See *Whitfield* v. *Aetna Life Ins. Co.*, 205 U. S. 489, 495; *Knights Templars' & Masons Life Indemnity Co.* v. *Jarman*, 187 U. S. 197, 202; *Hancock Mutual Life Ins. Co.* v. *Warren*, 181 U. S. 73, 75. This conception of broad state power has not been limited to particular kinds of laws or particular kinds of contracts of special kinds of insurance companies. Thus in regard to a mutual insurance company, the Court has held the terms of a policy governed by the law of Missouri where the contract was made in the face of a contract stipulation that they were to be governed by the laws of New York, the mutual company's domicil. *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389. For this Court concluded from inferences it found in the Missouri Court's opinion that compliance with Missouri law "was a condition upon the right of insurance companies to do business in the State." *Id.* at 395. It further held that Missouri had the same continuing power to regulate the business contracts of a foreign corporation permitted to do business there as it had over the contracts of domestic corporations. *Id.* at

400–401. And when a foreign building and loan association which did business with its members only [4] sought to avoid Mississippi usury laws by specifying that a loan contract with a Mississippi member was made in New York where the interest charged was not usurious, this Court held that Mississippi law governed and voided the contract. *National Mutual Bldg. & Loan Ass'n. v. Brahan*, 193 U. S. 635. The Court approved the conclusion of the Supreme Court of Mississippi that the association, by qualifying to do business in Mississippi, "had become 'localized' in the State, had accepted the laws of the State as a condition of doing business there, and could not, nor could [the Mississippi member] 'abrogate by attempted contract stipulations those laws.' *See Hancock Mutual Life Ins. Co. v. Warren*, 181 U. S. 73." *Id.* at 650. Because the contract was thus controlled by Mississippi rather than New York law, the Court held that "there is no foundation for the contention that full faith and credit were not given to the public acts and records of New York." *Id.* at 647.

The Court's opinion in the present case is apparently inconsistent with the foregoing cases which have established that state courts have a continuing authority to execute the public policy of the state by refusing to enforce contract provisions of foreign corporations permitted by the state to do business there—even though those corporations do business with members only. Today's opinion does imply, however, that South Dakota officials could have excluded this corporation from doing business in the state or could have revoked its license upon discovery of the foreign corporation's violation of the laws of the state. I cannot believe that the full faith and credit clause

[4] "The purpose of the Association is to make loans only to its members, and for the further purpose of accumulating a fund to be returned to its members who do not receive advances on their shares." *National Mutual Bldg. & Loan Ass'n* v. *Brahan*, 193 U. S. 635, 636.

stays the hands of the state courts as instruments of state power in private litigation any more than it could forestall state authorities from revoking the association's license for persisting in making unlawful contracts.

Third. Another handle of South Dakota's power over this corporation derives, not from the corporation's acceptance of South Dakota law as a continuing condition of doing business, but from the number and importance of the incidents involved in the making and the performance of the specific contract here which occurred in South Dakota. Unless the Court's decision overrules[5] the long line of cases cited in the margin[6] this insurance contract was "made" and to be performed in South Dakota, and its validity is governed by the law of that state. Thus in *Hartford A. & I. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, 150, Mississippi was required to enforce an insurance contract, unlawful in that state, although both the parties did business there, and although the suit on the contract was brought there, because the contract was valid in Tennessee, the state where the contract was held to have been made and which had the major connection with the whole transaction. For, said the Court, Mississippi "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made." *Id.* at 149.

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[5] The Court purports not to overrule these cases for it states: ". . . (W)e do not rely upon the place of concluding the contract of membership or upon the place prescribed for its performance."

[6] *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313; *Osborn* v. *Ozlin*, 310 U. S. 53; *Mutual Life Ins. Co.* v. *Johnson*, 293 U. S. 335, 339; *Northwestern Mutual Life Ins. Co.* v. *McCue*, 223 U. S. 234, 246–248; *Whitfield* v. *Aetna Life Ins. Co.*, *supra*, 495; *Knights Templars' and Masons' Life Indemnity Co.* v. *Jarman*, *supra*; *Chattanooga National Bldg. and Loan Ass'n.* v. *Denson*, 189 U. S. 408; *National Bldg. & Loan Ass'n* v. *Brahan*, *supra*; *Wall* v. *Equitable Life Ins. Co.*, 32 F. 273, affirmed *sub nom*, *Equitable Life Society* v. *Clements*, 140 U. S. 226.

Before today, contentions that the full faith and credit clause overcomes the power of a state over a contract made and operative there have been flatly rejected by this Court. Thus in *American Fire Ins. Co.* v. *King Lbr. & Mfg. Co.*, 250 U. S. 2, an insurance company was authorized by Pennsylvania, the state of its incorporation, to write fire insurance on property outside that state. It was not licensed to do business by Florida, but accepted insurance applications through independent brokers there. Under the law of Pennsylvania where the applications were accepted and the policies written, brokers were apparently not authorized to waive contract provisions. But under Florida law the brokers were deemed agents of the Pennsylvania company with power to bind it by waivers. In answer to the contention that the Florida ruling denied full faith and credit to the law of Pennsylvania, this Court said that the case does not

> "... present an attempt of the Florida law to intrude itself into ... Pennsylvania and control transactions there; it presents simply a Pennsylvania corporation having the permission of that State to underwrite policies on property outside of the State and the exercise of the right in Florida. And necessarily it had to be exercised in accordance with the laws of Florida. There was no law of Pennsylvania to the contrary—no law of Pennsylvania would have power to the contrary. There is no foundation, therefore, for the contention that full faith was not given to a law of Pennsylvania. ..." *Id.* at 10.

Fourth. In interpreting the full faith and credit clause this Court has repeatedly insisted that it would weigh all the interests of each state involved before holding that the full faith and credit clause qualified one state's power to govern its own affairs. See *Pink* v. *A. A. A. Highway Express*, *supra*, 210–21, and cases there cited; *Magnolia Petroleum Company* v. *Hunt*, 320 U. S. 430, 436–437. I

have recited the many bases for South Dakota's legitimate interest. What is the interest of Ohio to which the Court holds South Dakota must give full faith and credit?

It may be that the Court's view is that Ohio has an interest in securing uniformity of rights and obligations among all the policyholder-members throughout the country. For, says the Court, "If full faith and credit are not given . . . , the mutual rights and obligations of the members of such societies are left subject to the control of each state. They become unpredictable and almost inevitably unequal."

It is true that in situations involving the liability of stockholders for assessment obligations imposed by a corporate charter or the laws of a chartering state, the assessment obligation has been held to be governed by the laws of the chartering state. *Converse* v. *Hamilton*, 224 U. S. 243; *Broderick* v. *Rosner*, 294 U. S. 629. And assessments against fraternal as well as mutual insurance policyholders based on ownership rights and obligations which their insurance policies, like stock holdings, represent, have been similarly held to be controlled by the law of the state of the corporation's domicil. *Royal Arcanum* v. *Green*, 237 U. S. 531; *Hartford Life Ins. Co.* v. *Barber*, 245 U. S. 146; *Hartford Life Ins. Co.* v. *Ibs*, 237 U. S. 662. For insofar as a mutual or fraternal insurance policyholder assumes the assessment obligation which a stockholder may bear in other companies, he underwrites the risk that the corporation of which he is an owner might become insolvent. And that insolvency, particularly of an insurance company, would occur and generally become a responsibility of the chartering state where the principal business is conducted. The contingency of insolvency has been thought to give the chartering state greater and more direct interest in the extra-territorial collection of assessments against stockholders of corporations, than a state

has in the day-to-day business transactions in which a corporation chartered by it engages in other states.[7]

This line of distinction has been clearly marked by the contrary result this Court has reached in cases concerning day-to-day business contracts made by foreign non-fraternal mutual insurance and membership loan companies with their policyholders and member-borrowers. In *New York Life Ins. Co.* v. *Cravens, supra,* at 400, it was urged that the fact that the mutual insurance company there was "'the administrator of a fund collected from the policyholders in different States and countries for their benefit,'" demonstrated "the necessity of a uniform law to be stipulated by the parties exempt from the interference or the prohibition of the State where the insurance company is doing business." This contention was emphatically rejected. And in *National Mutual Bldg. & Loan Ass'n.* v. *Brahan, supra,* 636, 650, this Court, placing considerable reliance upon its previous *Craven* decision, held that contracts of a membership loan association whose controlling and central purpose, like the distinguishing "feature" relied upon by the Court here, was "to make loans only to its members and for . . . accumulating a fund to be returned to its members," were, despite the full faith and credit clause, subject to the law of a state in which the association was doing business as a foreign corporation.

[7] This contrast is dramatized by the consequences to Ohio's interest in the injury which would flow from South Dakota's disregard for this contract limitation which violates South Dakota's public policy. It is certainly a tenuous thread which would link South Dakota's refusal to enforce this and similar limitations to the undue depletion of the corporate funds. For it is unlikely that in calculating rates and risks, actuaries took into account the chance that the company might escape paying just claims because of company-imposed limitations on the time for bringing suit. On the other hand recovery of insurance claims often saves insurance beneficiaries from becoming public charges of the state of their residence.

It seems apparent from these authorities that Ohio's interest in uniform administration of a corporation's contract obligations for the funds of a company created under its laws is not entitled to full faith and credit merely because of the communal interest of policyholder-members in that fund. And the fact, so heavily stressed by the Court, that the corporation was incorporated under the laws of Ohio so that its continued existence depends upon that law is plainly insufficient basis for a contention that, therefore, Ohio's interest demands full faith and credit for this contract provision.

Actually, it is not Ohio's interest in the uniform administration of the company's funds to which the Court gives full faith and credit. For otherwise, I should think, the opinion would cite and distinguish these cases which establish that this interest is not one entitled to full faith and credit. It is the limitations "law" of the corporate constitution enacted to protect its own interest, not the statutes of Ohio, which are held to bar this suit because it was not filed within six months. Thus it seems manifest that the Court is giving full faith and credit to the "laws" and the interest of the Ohio corporation. And the Court does this on the theory that the fraternal corporation's constitution which governs the terms of its contracts is "subject to amendment through the processes of a representative form of government authorized by the law of the state of incorporation." Apparently, it is felt that the individual South Dakota policyholder-member can protect himself from overreaching contracts within the framework of this "representative" intracorporate government which is subject to whatever regulation Ohio chooses to impose. Until today I had never conceived of the Federal Constitution as requiring the forty-eight states to give full faith and credit to the laws of private corporations on the theory that a policyholder-member's ability to protect himself through intra-corporate politics makes state protection of him unnecessary and unconstitutional. It is a naive as-

sumption that a policyholder-member of a fraternal corporation like this does not need protection from his state. Moreover, if valid, this assumption would apply with equal logic to immunize these fraternal corporations from the laws of their domicils.

The conclusion reached by the Court that fraternal insurance companies are entitled to unique constitutional protection is not justified by the language of the Constitution nor by the nature of their enterprise. And our previous decisions concerning fraternal insurance companies do not support the conclusion which the Court draws from the superficial distinguishing characteristics which these companies possess.

As I have pointed out, those cases which hold that assessments against fraternal policyholders in their capacity as stockholders are governed by the law of the company's domicil, have no relation to a fraternal company's obligation to a beneficiary of an insurance contract. Moreover, in *Sovereign Camp W. O. W.* v. *Bolin*, 305 U. S. 66, heavily relied on by the Court, the fraternal association was freed from liability in a state in which it was not authorized to do business because a judgment of the highest court of the state which had chartered the association had declared, in a class suit to which the claimant had been, in effect, a party, that the policy sued on had been issued *ultra vires*. Thus the *Bolin* case is merely a familiar example of enforcement of *res judicata* under the full faith and credit clause. A judgment of any state, whether chartering state or not, would be entitled to the same respect. Here, of course, there is no judgment to which the claimant was a party which is entitled to full faith and credit. And the power of the Ohio corporation, so far as Ohio law is concerned, to make a contract consistent with South Dakota policy is unquestioned.

The other case relied on heavily by this Court is *Modern Woodmen of America* v. *Mixer*, *supra*. In that case, Mixer the beneficiary, lived in Nebraska. While

the record was not wholly clear, the insured had apparently previously lived in South Dakota, and the certificate seems to have been "issued" there. A by-law of the Woodmen, an Illinois association, provided that its certificate should insure against death but that "long continued absence of any member unheard of shall not . . . give any right to recover on any benefit certificate." Nebraska, where Mixer brought the suit, but in which state the contract had not been made, had a rule of evidence that a presumption of death arises from seven years unexplained absence. Apparently considering the by-law "unreasonable," the Supreme Court of Nebraska enforced its long-continued absence rule of evidence and held the association liable. The Supreme Court of Illinois, where the association was chartered, had held the by-law reasonable in that it merely showed a purpose of the association to limit its insurance to death rather than to extend it to long-continued absences. *Steen* v. *Modern Woodmen of America*, 296 Ill. 104. It was on this record that this Court reversed the Nebraska court's decision in the *Mixer* case.

This reversal can be justified on the facts of the *Mixer* case, which are clearly different from the facts in the case before us. There was no conflict in *Mixer* between the policy of the state where the contract was made, and Illinois, the state of the association's domicil. For the contract apparently had been made in a third state, South Dakota, consistently with the laws of that state. Nor does it appear from the record of that case that the association had been licensed to do business so as to accept either the law of the state where the contract was made, or that of Nebraska where the suit was brought. Finally, as I have already indicated, no statute of limitations was involved in the *Mixer* case.

But it is said that language of the *Mixer* case means that the obligations of a fraternal insurance corporation

are to be governed by the law of its domicil. If this language means that such an association is privileged to live above the law of the state where it does business, makes contracts, and is sued, I think that language should be repudiated. The purported differences between fraternal insurance companies and other reciprocal, co-operative and mutual insurers, are too fragmentary and inconsequential to justify any Constitutional difference in treatment. *Cf. Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313.

Neither in the *Mixer* case nor in the present one does the Court attempt to demonstrate, and I seriously question that a demonstration is possible, that the insurance business of a fraternal company is conducted differently in any important way from that of a mutual, reciprocal, or joint stock company. The insurance phase of this company is set apart from the fraternal phase after election to membership, even though payment of assessments levied for insurance purposes is made compulsory. The provisions of its constitution show that insurance terms and conditions are precisely like those of non-fraternal companies. Insurance funds are administered on a business basis, and they cannot be used for fraternal purposes. In short, the insurance program and activities reveal that this is an insurance company, run like other insurance companies. The only non-paper difference is that insurance is sold only to members of the fraternity.

Nor is it apparent to me that an individual policyholder-member in a remote community exercises any significant influence on the technical insurance aspects of a fraternal company's business. Certainly, he can no more control the policy contract provisions than could a mutual policyholder or a member of a membership loan association. And the individual member would share as much and no more in the fraternal company's gains from overreaching contracts as would participants in these indistinguishable associations.

That fraternal-order insurance businesses such as petitioner's are of a magnitude to move each state to regulate them so as to protect its citizens can hardly be doubted. The best information obtainable shows that in 1944 fraternal life insurance businesses in the United States had aggregate assets of almost $1,500,000,000; income of $255,600,000; $6,794,300,000 insurance in force; and 7,582,000 outstanding certificates. During 1944 they spent $43,300,000 for agents and management.[8] There is, thus, every reason for giving the same force and effect to state regulation of fraternal insurance companies as is given regulation of all other insurance businesses.

Fifth. I fear that it may be significant that the Court has conspicuously refrained from stating in unmistakable terms that its new doctrine applies only to fraternal insurance companies. If, as the Court holds, the interest of Ohio or of its corporate creature does outweigh the interest of every state in which that creature does business, I see no sound basis in the facts or in the authorities cited by the Court for declining to apply this formula to almost every type of business corporation created in one state and doing business in another.

The effect of such a doctrine on the rights of states to govern themselves is graphically demonstrated by the insurance business. The five largest legal reserve life insurance companies in the United States, with total assets of approximately $15,000,000,000, have their home offices in or near New York and Connecticut. *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 541. The result of the Court's opinion, if later carried to its logical conclusion, would be that the policy obligations of all of these companies, in whatever state assumed, would be governed by New York or Connecticut law or that of nearby states, and that all of the other states would

[8] Statistical Abstract of the United States, Dept. of Commerce, Bureau of the Census (1946) 442.

be deprived of power to pass legislation believed by them to be necessary to protect their own citizens against unconscionable contracts. By permitting its insurance corporations, particularly mutual companies, to make contracts barring an insured's access to state courts, New York, for example, could thus render all the other states helpless to provide a judicial haven for their own wronged citizens.

Such a doctrine is not only novel; it is revolutionary. I think the doctrine violates the very Constitution that it is our duty to interpret. For the Court today, in part, nullifies a great purpose of the original Constitution, as later expressed in the Tenth Amendment, to leave the several states free to govern themselves in their domestic affairs. Hereafter, if today's doctrine should be carried to its logical end, the state in which the most powerful corporations are concentrated, or those corporations themselves, might well be able to pass laws which would govern contracts made by the people in all of the other states.

I would affirm this judgment.